Supreme Court, U. S.
FILED
APR 7 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JEROME C. MUYS
DEBEVOISE & LIBERMAN
806 15th Street, N.W.
Washington, D.C. 20005
(202) 393-2080

MALCOLM Y. MARSHALL
OGDEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40270
(502) 582-1601

Attorneys for Kentucky, Utilities Company, Petitioner

April 7, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTE INVOLVED	3
STATEMENT	4
A. Background	5
B. Proceedings Before the Commission	10
C. The Decision Below	11
REASONS FOR GRANTING THE WRIT	12
A. Introduction	12
B. The Decision Below Reverses the Basic Rationale of This Court's *Mobile-Sierra-Memphis* Doctrine	16
1. The Conclusion That Kentucky Utilities' Preexisting Rights under Kentucky Law Were Terminated upon the Filing of Its Contracts with the FPC Since Those Contracts Did Not Expressly Set Out Such Rights Is in Error	17
2. The Denial of Kentucky Utilities' Request for a Hearing on the Disputed *Mobile-Sierra* Issues Misinterprets This Court's *Mobile* Decision, Violates the Federal Power Act, and Conflicts with the Third Circuit's Rule on the Matter	24
3. The Commission's Refusal To Examine the Conduct of the Parties and Other Relevant Evidence Extrinsic to the Disputed Contracts Violates Its Obligations under the Federal Power Act to Develop a Comprehensive Record in the Public Interest	28

Page

C. This Court's Suggestion in *Sierra* That Section 206(a) Might Provide an Avenue of Relief from Fixed Rate Contracts in Appropriate Circumstances Has Proved To Be Illusory 35

CONCLUSION 39

APPENDIX A—Opinion of the Court of Appeals in *Appalachian Power Co., et al.* v. *FPC* (No. 73-1290, *et al.*), January 8, 1976 ..... 1a

APPENDIX B—FPC Order Rejecting in Part Proposed Increase in Rates, Accepting For Filing in Part and Suspending Proposed Increases in Rates, Providing For Hearing, Establishing Procedures and Permitting Interventions in *Kentucky Utilities Co.*, Docket No. E-8172 ..... 22a

APPENDIX C—FPC Order Denying in Part and Granting Motion for Rehearing and Instituting An Investigation Under Section 206 in *Kentucky Utilities Co.*, Docket No. E-8172 ..... 27a

APPENDIX D—FPC Order Granting Application for Rehearing and Instituting a Section 206 Investi- in *Kentucky Utilities*, Docket No. E-8172 ..... 33a

APPENDIX E—Sections 205, 206(a), 308(b) and 313(b) of the Federal Power Act 37a

APPENDIX F—Sections 278.160, 278.180 and 278.190 of the Kentucky Revised Statutes 41a

APPENDIX G—Some Recent Federal Power Commission Decisions Applying the Mobile-Sierra-Memphis Doctrine (June 1973-March 1976) 43a

TABLE OF CITATIONS

Page

CASES:

Accardi v. *Shaughnessy*, 347 U.S. 260 (1954) 31

Borough of Lansdale v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974) 14, 19, 36

Chase Manhattan Bank v. *First Marion Bank*, 437 F.2d 1040 (5th Cir. 1971) 32

Duke Power Co. v. *FPC*, 401 F.2d 930 (D.C. Cir. 1968) 19

Evenson v. *Pubco Petroleum Corp.*, 274 F.2d 866 (10th Cir. 1960) 32

Farmers Merchants' Bank of Monroe, N.C. v. *Federal Reserve Bank*, 262 U.S. 645 (1923) 19

FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) 2, *passim*

FPC v. *Southern California Edison Co.*, 376 U.S. 205 (1964) 8, 13

Gulf States Utilities Co. v. *FPC*, 518 F.2d 450 (D.C. Cir. 1975) 14, 26

Indiana & Michigan Elec. Co. v. *FPC*, (C.A.D.C. No. 74-1844), decided February 12, 1976 14

Minnesota Power & Light Co. v. *FPC*, (C.A.D.C. No. 74-1796), decided January 16, 1976 14

Mississippi River Fuel Corp. v. *FPC*, 202 F.2d 899 (3rd Cir. 1953) 25

Mobile Gas Service Corp. v. *FPC*, 215 F.2d 883 (3rd Cir. 1954) 30

Mobil Oil Corp. v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973) 25

Municipal Light Boards of Reading and Wakefield, Mass. v. *FPC*, 450 F.2d 1341 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 989 (1972) 26, 27

Opp Cotton Mills, Inc. v. *Administrator, Dept. of Labor*, 312 U.S. 126 (1941) 31

Pacific Gas & Electric Co., 18 F.P.C. 15 (1957), *aff'd, Pacific Gas & Electric Co.* v. *FPC*, 267 F.2d 165 (D.C. Cir. 1959) 36

Pacific Portland Cement Co. v. *Ford Machinery & Chemical Corp.*, 178 F.2d 541 (9th Cir. 1949) 26

Richmond Power & Light v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973) ..14, 26, 34

Sam Rayburn Dam Electric Coop. v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975) 14, 33

Page

Samuel H. Moss, Inc. v. *FTC*, 148 F.2d 378 (2nd Cir. 1945) 31
Scenic Hudson Preservation Conf. v. *FPC*, 354 F.2d 608 (2nd Cir. 1965), *cert. denied*, 384 U.S. 941 (1966) 32
Service v. *Dulles*, 354 U.S. 363 (1957) 31
Shell Oil Co. v. *FPC*, 334 F.2d 1002 (3rd Cir. 1964) ..15, 25
Sierra Pacific Power Co. v. *FPC*, 223 F.2d 605 (D.C. Cir. 1955) 30
Simpson Timber Co. v. *Palmberg Const. Co.*, 377 F.2d 380 (9th Cir. 1967) 32
United Gas Pipe Line Co., 16 F.P.C. 19 (1956) 30
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) .....2, *passim*
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) .....2, *passim*

STATUTES:

Federal Power Act
§ 205(c), 16 U.S.C. 824d(c) 18, 19
§ 205(d), 16 U.S.C. 824d(d) 3, 4, 5, 11, 20
§ 205(d), 16 U.S.C. 834d(e) 3, 11
§ 206(a), 16 U.S.C. 824e(a) 34-36
§ 308(b), 16 U.S.C. 825g(b) 3, 4
§ 313(b), 16 U.S.C. 825*l*(b) 3, 4, 11, 25
28 U.S.C. 1254(1) 2

REGULATIONS:

18 C.F.R. § 1.26 31
18 C.F.R. § 35.13 31
Kentucky Public Service Commission "Rules Governing Tariffs" (Rules I-III, XI) 6

MISCELLANEOUS:

3 Corbin on Contracts § 554 26
42nd FPC Ann. Rep. 71 (1963) 13
43rd FPC Ann. Rep. 65-66 (1963) 13
44th FPC Ann. Rep. 85-[illegible] (1964) 13
45th FPC Ann. Rep. 85-[illegible] (1965) 13
46th FPC Ann. Rep. 90-92 (1966) 13
Restatement of Contracts §§ 234 and 242 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

KENTUCKY UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Kentucky Utilities Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, pp. 1a-21a *infra*) is not yet reported. The initial order of the Federal Power Commission dated June 29, 1973 (App. B, pp. 22a-26a *infra*), its order of August 22, 1973 modifying its initial order (App. C, pp. 27a-32a *infra*) and its order of October 18, 1973 denying rehearing (App. D, pp. 33a-36a *infra*) are reported at 49 FPC 1470, 50 FPC 537 and 50 FPC 1120, respectively.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1976 (App. A, p. 1a *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. 825*l*(b).

QUESTIONS PRESENTED

Whether, under this Court's *Mobile-Sierra-Memphis*[1] doctrine establishing that the ratemaking powers of electric utilities subject to regulation under the Federal Power Act are to be no different from those they would possess in the absence of the Act:

(1) an electric utility's filing with the Federal Power Commission of its contracts for wholesale service which had been entered into when such service was exclusively under the judisdiction of a state public service commission (a) terminates that utility's preexisting rights under state law and the contracts to file unilateral rate changes (unless such rights have been expressly preserved in the contracts), and (b) makes state law thereafter irrelevant to the interpretation of those contracts and subsequent amendments unless expressly incorporated by reference?

(2) the FPC may summarily reject a utility's rate increase filing as barred by alleged "fixed rate" contracts without (a) granting the utility a requested hearing to show what its ratemaking powers were under

[1] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Divsion*, 358 U.S. 103 (1958) (hereafter *"Mobile"*, *"Sierra"* and *"Memphis"*).

the disputed contracts or (b) considering extrinsic evidence demonstrating that such contracts were not intended or understood by the parties to bar unilateral rate increases and had been so construed by the utility, its customers and the FPC staff?

STATUTE INVOLVED

Sections 205(d) and (e), 308(b) and 313(b) of the Federal Power Act (App. E, pp. 37a-41a *infra*) provide in pertinent part:

Section 205

> (d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect.
>
> (e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it

would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective.

Section 308

(b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied.

Section 313

(b) . . . The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. . . .

STATEMENT

This case involves the legality of the Federal Power Commission's ("FPC" or "Commission") summary rejection of an electric rate increase filing by Kentucky Utilities Company ("Kentucky Utilities", "KU" or "Company"), its first rate increase to its municipal wholesale customers in 15 years, on the ground that the rate provisions of its service agreements with those customers precluded a unilateral filing under this Court's *Mobile-Sierra-Memphis* doctrine. The essence of that doctrine is that the ratemaking powers of public utilities under the Federal Power Act and natural gas companies under the Natural Gas Act are to be no different from those they would possess in the absence of those acts, so that a public utility may unilaterally initiate electric rate increases for its customers pursuant to section 205(d) of the Federal

Power Act if such changes are " 'otherwise valid' in the light of the relationship between the parties." [2]

The FPC refused to grant the Company a hearing on the disputed contract language or to consider extrinsic evidence demonstrating that the identical rate language had not barred unilateral rate changes by KU under Kentucky law prior to the FPC's assumption of jurisdiction over its sales and had been interpreted by the Company, the Commission Staff and the customers as not barring a substantial rate reduction after the contracts were filed with the FPC. The decision turns the *Mobile-Sierra-Memphis* doctrine on its head, violates the Commission's obligation under the Federal Power Act to grant a hearing and develop an adequate record in such disputes, and sets the administrative process back 50 years by a rigid application of an outmoded version of the parol evidence rule as the sole basis of its order.

A. Background

Kentucky Utilities is an electric utility organized and existing under the laws of the State of Kentucky and provides retail and wholesale electric service throughout that state. It provides all requirements wholesale service to eleven municipal distribution systems ("Cities") [3] and a rural electric distribution cooperative, as well as partial requirements service to Old Dominion Power Company and the City of Paris, Kentucky.

---

[2] *Memphis*, 358 U.S. at 112; *Sierra*, 350 U.S. at 353.

[3] The Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Nicholasville and Providence, and Berea College serving the City of Berea at retail.

Service to the Cities was instituted in the 1940's, at which time the Kentucky Public Service Commission exercised exclusive regulatory authority over the rates and conditions of service to the Cities. Under the Kentucky Public Service Commission Act a utility is required to file its rate schedules with the Kentucky Commission and may not charge other than its filed rates. (App. F, pp. 41a-42a, *infra*). The Cities were served under standard short form "ES-2" contracts for retail service, slightly modified to cover wholesale service, which incorporated by reference the Company's wholesale rate "WPS" and its standard rules and regulations then on file with the Kentucky Commission. Six of the standard short form agreements also incorporated a supplemental long form contract where, for a variety of reasons, additional contract provisions were needed.[4] The Kentucky statute does not require utilities to file such service agreements with the Kentucky Commission, nor do the Kentucky Commission's regulations, unless such contracts provide for special rates or conditions of service not included in a utility's filed tariffs.[5] Consequently, KU had never filed any of its contracts with the Cities with the Kentucky Commission.

The rate provisions of the Company's short form contract executed with Bardstown in 1946 are typical of those with all of the municipal customers (FPC No. 22, R. 2):

> Each month the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to the Customer during the preceding month or bi-month determined in accordance with rate schedule number WPS which is made part of this contract.

[4] Bardstown, Berea College, Corbin, Falmouth, Frankfort and Nicholasville. R. 5, 27, 36-37, 48-49, 56 and 103. ("R" refers to the record before the court of appeals).

[5] Ky. Pub. Serv. Comm. "Rules Governing Tariffs" (Rules I-III, XI).

None of the short form contracts contained language concerning rate changes within the term of the contract.

The rate provisions of Bardstown's supplemental long form contract were as follows:[6]

> Each month Customer will pay Company at its office in Springfield, Kentucky, within ten (10) days of rendition of bill, for all electric service delivered to Customer during the preceding month, determined in accordance with the Company's Wholesale Power Service Rate Schedule WPS-2, *as filed with the Public Service Commission of Kentucky from time-to-time*. Copy of present Rate Schedule WPS-2 is attached and made a part of this contract.

All of the long form contracts contained identical or similar provisions making such service subject to whatever Kentucky Utilities' currently effective filed rate schedule might be from time to time (R. 5, 27, 36-37, 48-49, 56).

The Kentucky Public Service Commission Act permits a utility to initiate changes in a filed rate schedule by simply filing a superseding rate schedule.[7] In 1957, pursuant to that procedure, the Company unilaterally filed a new "WPS" rate for the Cities as part of a general rate increase. Several of the Cities intervened

[6] Art. II, par. 2, emphasis added (FPC No. 22, R. 5).

[7] Sections 278.180, 278.190, App. F, pp. 41a-42a *infra*.

and opposed the amount of the increase, but none of them argued that it was in violation of their service contracts, and it was approved by the Kentucky Commission.

On September 7, 1962, Kentucky Utilities filed its wholesale contracts with the FPC at the latter's request (R. 341). Pointing out that all of its "wholesale rates have been subject to regulation by the Public Service Commission of Kentucky for many years", the Company specifically reserved its rights to challenge the FPC's jurisdiction over its intrastate wholesale transactions.[8] The reason for the Company's reservation of the jurisdictional issue was that the scope of the FPC's authority over intrastate wholesale sales served from an electric utility receiving interstate power flows from other interconnected electric utilities was then in litigation. (The Commission's jurisdiction in such circumstances was not clarified until several years later in this Court's decision in the *City of Colton* case, *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964)).

In its first action on KU's municipal wholesale rates subsequent to its approval of the 1958 rate increase, late in 1962 the Kentucky Commission approved a rate reduction ("WPS-5") for the Cities, which KU made available through new, streamlined standard short form contracts. The rate provisions of the new contracts were substantially identical to the previous ES-2 short form contracts. They simply incorporated by reference Kentucky Utilities' then effective rate WPS-5 on file with the Kentucky Commission and, as had been true of the previous short form contracts, were silent concerning rate changes within the term of the contract.

[8] FPC Original Sheet No. 1a.

(R. 170). These new WPS-5 contracts were filed with the FPC, superseding the WPS contracts filed a year earlier.

Subsequent discussions between the Company and the FPC Staff in 1965 led to a further rate reduction for the Cities (WPS-3R), which was filed with both the Kentucky Commission and the FPC. In effecting both the 1963 and 1965 rate reductions, KU proceeded on the assumption, consistent with Kentucky law and its previous practice in initiating rate increases, that such changes were not barred by its contracts with the Cities. In 1965 both the Company and the FPC Staff agreed that the language of the previously filed 1963 "WPS-5" contracts did not provide for fixed rates and so advised the Cities in announcing a substantial rate reduction (R. 425-26). None of the Cities disagreed, and all accepted their second rate reduction in three years.

Consistent with its actions in effecting the 1963 and 1965 rate reductions, Kentucky Utilities in 1969 unilaterally filed a revision in its fuel clause adjustment factor, the effect of which was yet another rate reduction. However, the Secretary of the FPC informed KU that its fuel clause could not be changed without agreement of the Cities since Staff "review of the agreements that would be affected by the subject filing indicates that they do not contain provisions which would permit a unilateral change to be made therein." (R. 559). Although this interpretation was inconsistent with KU's view of its contractual authority and the Staff's previous interpretation of the identical rate language in 1965, the Company nevertheless complied with the Commission's suggestion and obtained the concurrence of all but one of the Cities.

B. Proceedings Before the Commission

On May 1, 1973, Kentucky Utilities tendered for filing with the FPC in Docket No. E-8172 a proposed $773,000 annual rate increase, designated WPS-73, applicable to the Cities and its two partial requirements customers (R. 433-505). This was the Cities' first rate increase in 15 years, during which period they had received three rate reductions unilaterally initiated by the Company or, in the case of the 1965 reduction, by the FPC staff. Nevertheless, the Cities filed a motion to reject the filing on the ground that it violated their contracts, which they claimed provided for fixed rates under the *Mobile-Sierra* doctrine (R. 510-62).

Kentucky Utilities disputed the Cities' contention, pointing out that the contracts were silent as to whether a unilateral filing was permissible but should be interpreted as "going rate" contracts in light of the background of Kentucky law under which they had originated and the previous practice and understanding of the parties and the FPC staff thereunder.

In an order issued June 29, 1973, the Commission held that the contracts with all of the Cities were fixed rate contracts and rejected the Company's filing. (App. B, pp. 22a-26a *infra*). KU sought rehearing, contending that the Commission had erroneously interpreted the contracts and asking that it be given an opportunity to establish the factual circumstances supporting its interpretation at an evidentiary hearing (R. 653-73).

By order of August 22, 1973, the Commission denied KU's request for a hearing, but did modify its original order by rejecting the rate increase only to the extent that it applied to deliveries up to certain demand quantities specified in the contracts. With respect to the

deliveries in excess of the specified contract requirements, the Commission accepted the filing as an "initial rate schedule" and set those rates for hearing under Section 206 of the Federal Power Act. (App. C, pp. 27a-32a *infra*).

The Cities sought rehearing of that order, arguing that the FPC's interpretation of the demand limits in the contracts was inconsistent with the practical construction of the contracts by the parties (R. 690-698). On October 18, 1973, the Commission reversed its decision of August 22, 1973, and held that the Company's *entire* rate increase to the Cities, including deliveries in excess of the amounts set forth in the contracts, was barred under *Mobile-Sierra*. It therefore rejected KU's rate increase to the Cities in its entirety. (App. D, pp. 33a-36a *infra*).

C. The Decison Below

Kentucky Utilities petitioned the Court of Appeals for the District of Columbia Circuit for review of the FPC's orders under section 313(b) of the Federal Power Act (16 U.S.C. § 825*l*(b)). Its petition was consolidated for oral argument and decision with *Appalachian Power Co.* v. *FPC*, No. 73-1290, which involved a contract issue common to one of those involved in KU's case. On January 8, 1976 the court of appeals affirmed the FPC in both cases.[9] It held that since Kentucky Utilities had neither expressly reserved in its contracts a right to file a unilateral rate increase nor expressly incorporated applicable Kentucky law principles or other procedures providing for a change in rates, "the Commission rightly held that state law had

[9] Appalachian Power Company has reportedly reached a settlement of its dispute with its municipal customers.

no proper role in the process of interpreting the contracts". (App. A, p.14a, *infra*). It also held that it would be improper to look to the conduct of the parties and other extrinsic evidence to interpret what the court referred to as the "unambiguous" and "unmistakeable" terms of the contracts (*id.* at 14a-15a). Finally, the court affirmed the Commission's refusal to grant KU an evidentiary hearing, holding that there were no "factual" issues justifying a hearing since "construction of unambiguous features of a written contract is a legal problem" (*id.* at 18a).

Judge Lumbard, concurring, added that the Kentucky Utilities case presented "a more troublesome question" than did *Appalachian Power*. However, in stating his basic agreement with the court's result, he stressed that he did not believe that "there is any warrant in either *Sierra Pacific-Mobile* or elsewhere, for requiring the F.P.C. to defer to state law when such a deferral would impair the Congressional purpose of insuring 'the stability of supply arrangements which all agree is essential to the health of the natural gas [and power] industries', *Mobile*, 350 U.S. at 344." (*Id* at 21a.)

REASONS FOR GRANTING THE WRIT

A. INTRODUCTION

Twenty years ago this Court, in its *Mobile-Sierra-Memphis* trilogy of decisions,[10] laid down the basic legal principles governing the relationship of rate change procedures under the Federal Power Act and

[10] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958).

the Natural Gas Act to contractual arrangements between the electric utilities and natural gas companies subject to regulation by the Federal Power Commission under those statutes and their customers. In the intervening period there have been dramatic developments in the FPC's responsibilities under the Federal Power Act in two significant aspects.

First, the Commission's aggressive assertion in the early 1960's of its jurisdiction over electric utility sales at wholesale in interstate commerce under the Federal Power Act, clarified and confirmed by this Court in *FPC* v. *Southern California Edison Co.*, 376 U.S. 205 (1964), operated to bring under the Commission's regulatory aegis upwards of a thousand wholesale sales by some 150 electric utilities, most covered by a wide variety of contracts, that had previously been regulated by state public service commissions.[11]

Second, spiraling costs associated with providing electric service in recent years, largely as a result of increased construction, financing, fuel and environmental protection costs, have forced electric utilities to invoke the rate change procedures of the Federal Power Act with increasing frequency with respect to the broadened range of transactions brought under the Commission's jurisdiction in the 1960's. Consequently, the Commission's formal electric rate case load has grown significantly, so that while there were only eight cases pending at the end of fiscal 1962,[12] there were 229 pending at the end of December 1975.[13]

[11] 42nd F.P.C. Ann. Rep. 71 (1962); 43rd F.P.C. Ann. Rep. 65-66 (1963); 44th F.P.C. Ann. Rep. 85-86 (1964); 45 F.P.C. Ann. Rep. 85-86 (1965); 46th F.P.C. Ann. Rep. 90-92 (1966).

[12] 43rd F.P.C. Ann. Rep. 66 (1963).

[13] FPC News, Vol. 9, No. 8, p. 49 (1976).

These two converging trends have produced a plethora of disputes before the Commission involving the application of the *Mobile-Sierra-Memphis* rule. In the last three years alone, such issues have been raised by customers opposing electric rate filings by at least 30 electric utilities (App. G, pp. 43a-45a *infra*). The Commission's response has been distressingly inconsistent, requiring increasing resort to various courts of appeals by either the utilities or their customers.[14] In one recent case Judge Wright of the District of Columbia Circuit characterized the Commission's attempt to apply the rule as "aimless, erratic and confused".[15] We agree, and shall demonstrate that the District of Columbia Circuit is having its problems also.

In addition to the increasing problems involved in its application under the Federal Power Act, the *Mobile-Sierra-Memphis* doctrine is also beginning to be applied by other federal administrative agencies which are relying on the District of Columbia Circuit's decisions under the Federal Power Act. See, *e.g., Bell Telephone*

[14] *Gulf States Utilities Co.* v. *FPC*, 518 F.2d 450 (D.C. Cir. 1975); *Sam Rayburn Dam Elec.Coop.* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975); *Borough of Lansdale* v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974); *Richmond Power & Light* v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973); *Indiana & Michigan Elec. Co.* v. *FPC* (C.A.D.C. No. 74-1844), decided February 12, 1976; *Minnesota Power & Light Co* v. *FPC* (C.A.D.C. No. 74-1796), decided January 16, 1976.

Petitions for review of FPC *Mobile-Sierra* orders are pending in *City of Anaheim* v. *FPC* (C.A.D.C. No. 73-2173); *Holyoke Water Power Co.* v. *FPC* (C.A.D.C. No. 74-2085); *Pub. Serv. Co. of N. Mexico* v. *FPC* (C.A. 10 No. 75-1692); *New England Power Co.* v. *FPC* (C.A.D.C. No. 75-1945); *Pub. Serv. Co. of Indiana* v. *FPC* (C.A.D.C. No. 75-2136) and *City of Gallup* v. *FPC* (C.A. 10 No. 76-1013).

[15] *Borough of Lansdale, Penna.* v. *FPC*, 494 F.2d 1104, 1115 (1974).

Co. of Penna. v. *FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

The decision below is in basic conflict with the fundamental premise of this Court's *Mobile-Sierra-Memphis* doctrine. The court of appeals' refusal to require the Commission to grant Kentucky Utilities a hearing on the fixed rate dispute conflicts with the Third Circuit's contrary decision under the companion Natural Gas Act[16] and violates the Commission's obligations under the Federal Power Act. The court's surprising invocation and Draconian application of the "parol evidence rule" to the interpretation of Kentucky Utilities' contracts (1) conflicts with the well established principle that the rigid application of exclusionary rules of evidence is wholly inappropriate in administrative proceedings, (2) ignores the Commission's broad responsibilities to develop a comprehensive record in carrying out its public interest obligations under the Federal Power Act, and (3) conflicts with its own earlier decisions on the same issue. The result is to cause substantial financial injury to KU and to threaten similar harm to numerous other utilities subject to FPC jurisdiction.

Consequently, at this vital juncture in the electric utility industry's continuing struggle for timely rate relief to provide funds to meet the soaring costs of providing electric service, it is essential that this Court issue a writ of certiorari in this case in order (1) to restore the proper application of the *Mobile-Sierra-*

[16] *Shell Oil Co.* v. *FPC*, 334 F.2d 1002, 1007 (1964). Precedents under the Natural Gas Act on *Mobile-Sierra* issues are equally applicable to the Federal Power Act. *Sierra*, 350 U.S. at 353.

Memphis doctrine in the administration of the Federal Power Act so that its objective to facilitate the "earliest effectuation of contractually authorized or otherwise permissible rate changes" (*Memphis,* 358 U.S. at 114) will not be frustrated, and (2) to provide guidance to other federal agencies that are just beginning to apply the *Mobile-Sierra-Memphis* doctrine under other regulatory statutes.

B. THE DECISION BELOW REVERSES THE BASIC RATIONALE OF THIS COURT'S MOBILE-SIERRA-MEMPHIS DOCTRINE

The cardinal principle of the *Mobile-Sierra-Memphis* doctrine governing the authority of an electric utility or a natural gas company to initiate rate increases under the filing provisions of the Federal Power Act and the Natural Gas Act is that "the ratemaking powers of [such] companies [are] to be no different from those they would possess in the absence of the [Federal Power or Natural Gas] Act: to establish *ex parte,* and change at will, the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer." (*Mobile,* 350 U.S. at 343.) The rule was succinctly stated in *Memphis* as simply that "changes which in fact are 'otherwise valid' in the light of the relationship between the parties can be put into effect under [the Act] by a seller through giving the required notice to the Commission." (358 U.S. at 112.) Thus a utility "has the right in the first instance to change its rates as it will, unless it has undertaken by contract not to do so". (*Id.* at 113.)

The decision below completely undercuts the foundation principles of the *Mobile-Sierra-Memphis* doctrine. First, the court holds that whatever rights KU may

have possessed to make unilateral changes under Kentucky law prior to the filing of its contracts with the FPC in the early 1960's were required to be expressly set out in those contracts or suffer extinguishment. Second, to the extent that the rate provisions of those contracts either do not expressly provide an independent rate change procedure or incorporate such a procedure by reference to state law, neither state law nor any other evidence extrinsic to the contracts may be considered in attempting to ascertain the parties' intent. Finally, the court's reasoning implies, and Judge Lumbard's concurring opinion makes clear, that even if Kentucky law could properly be looked to and would have permitted a unilateral filing, it has somehow been superseded by the Federal Power Act. All three of the court's conclusions are demonstrably wrong and in basic conflict with the *Mobile-Sierra-Memphis* decisions.

1. The Conclusion that Kentucky Utilities' Preexisting Rights Under Kentucky Law Were Terminated Upon the Filing of Its Contracts with the FPC Since Those Contracts Did Not Expressly Set Out Such Rights Is in Error.

Both before the FPC and the court of appeals, Kentucky Utilities contended that under the Kentucky Public Service Commission Act, under which its service to the Cities was exclusively regulated by the Kentucky Commission prior to KU's gradual accession to the FPC's assertion of jurisdiction in the mid-1960's, it was entitled to and had in fact effected unilateral rate increases without the consent of its customers. The Company argued that the Kentucky statutes and regulations established a "filed tariff" regulatory system under which a utility's right to file for increases in its filed rates is not dependent upon con-

tractual consent by its customers. As such, it was similar to the regulatory systems provided for under the Interstate Commerce Act and the public service commission laws of some other states which this Court distinguished from the Federal Power Act and the Natural Gas Act in *Mobile* (350 U.S. at 338, 346-47). Kentucky Utilities stressed that, unlike the Federal Power Act, the Kentucky statute does not require a utility's service contracts to be filed, a fact to which this Court attached great significance in *Mobile* (*Id.* at 338, emphasis added):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, *by requiring contracts to be filed with the Commission,* the Act expressly recognizes that rates to particular customers may be set by individual contracts.

Neither the Commission nor the court of appeals ruled on KU's claims as to its preexisting ratemaking powers under Kentucky law, which both held was wholly irrelevant to the Company's right to file for rate increases under the Federal Power Act once it had filed its contracts with the FPC under section 205(c) and supplemented them without expressly preserving in those contracts any such preexisting rights. (App. A, pp. 16a-17a, *infra*). We think the court's conclusion that the filing requirements of the Federal Power Act somehow imposed a new burden on KU's "preexisting ratemaking powers," even though *Mobile* stressed that the Act left such powers "undefined and unaffected" (350 U.S. at 343), is patently erroneous and in irreconcilable conflict with the *Mobile-Sierra-Memphis* doctrine.

As the D. C. Circuit recognized in an earlier *Mobile-Sierra* decision, "it is the purpose of that doctrine to subordinate the statutory filing mechanism [of the Federal Power Act] to the broad and familiar dictates of contract law." [17] One of those "familiar dictates", ignored by the decision below, is that, unless a contract discloses a contrary intention, existing law at the time the contract is made will be read into it just as if an express provision to that effect had been included. As Justice Brandeis characterized the rule:[18]

> Laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they had been expressly referred to or incorporated in its terms. This principle embraces alike those laws which affect its *construction* and those which affect its enforcement or discharge.

The court below reverses that fundamental principle and holds that state law, which was admittedly relevant to the intent of the parties when they were subject exclusively to the jurisdiction of the Kentucky Commission, somehow became irrelevant to construction of the contracts the moment they were filed with the FPC under section 205(c) unless expressly incorporated by reference. In the court's view, "neither state law nor conflict-of-laws principles summoning state law operate of their own force upon contracts subject to the Commission's regulatory jurisdiction" (App. A, p. 10a *infra*). For this erroneous proposition Judge Robinson relies on his earlier opinion in *Duke Power Co.* v. *FPC,* 401 F.2d 930, 934-38 (D.C.

---

[17] *Borough of Lansdale, Pa.* v. *FPC*, 494 F.2d 1104, 1113 (1974).

[18] *Farmers Merchants' Bank of Monroe, N.C.* v. *Federal Reserve Bank,* 262 U.S. 645, 660 (1923) (emphasis added).

Cir. 1968). But that case dealt with the question of the appropriate federal-state *jurisdictional* powers over the electric utility industry under the Federal Power Act, which is not at issue here since no one disputes the FPC's regulatory jurisdiction over the contracts in question or the applicability of all relevant regulatory aspects of the Federal Power Act.

Judge Lumbard's concurring opinion further highlights the court's basic confusion, disposing of KU's contention that it was permitted to file unilateral increases under Kentucky law as follows (App. A, p. 21a *infra*):

> Assuming, *arguendo,* that such is . . . the case under Kentucky law, I do not believe that there is any warrant in either *Sierra Pacific-Mobile* or elsewhere, for requiring the F.P.C. to defer to state law when such a deferral would impair the Congressional purpose of insuring "the stability of supply arrangements which all agree is essential to the health of the natural gas [and power] industries." *Mobile,* 350 U.S. at 344. *Cf. Jerome* v. *United States,* 318 U.S. 101, 104 (1945).

But the Federal Power Act "purports neither to grant nor to define the initial rate setting powers of [utilities]" (*Mobile,* 350 U.S. at 341) and provides no independent federal standard to resolve the question of whether a utility's filing under section 205(d) is "otherwise valid". This Court has made it clear that the answer to that question turns on Kentucky Utilities' "preexisting ratemaking powers", not the preemptive effect of the Federal Power Act in certain regulatory areas, and it is to that contract interpretation issue that Kentucky law is critically relevant. It would seem irrefutable that since the initial contracts between the parties were formulated and entered into

solely in relation to the law of Kentucky, that law is pertinent to determine their intent as to the rate provisions which were carried over almost verbatim into subsequent supplements to those contracts.

The court distinguishes its earlier *Anderson* decision because the KU contracts currently in effect were executed after the FPC had asserted jurisdiction over the sales in question (App. A, pp. 16a-17a *infra*):

> In *Anderson*, the court made reference to contracts that were on file only with the state commission, whereas in this case the relevant contracts are on file with this Commission. Moreover, in *Anderson,* the court ruled that since the contract was entered into in 1957, the parties intended that Indiana law should apply and therefore a unilateral filing would not be allowed. The present contracts were entered into in 1963, 1965, 1969, or 1970 (see Appendix A). KU began filing on September 7, 1962, at the Commission's request. While the Commission's attempt to assert jurisdiction over the agreements was not finally affirmed until 1965, KU and the parties must have assumed the Commission might have jurisdiction since they filed the agreements with the Commission and with the Kentucky Commission. Therefore, *Anderson* is not controlling and the instant agreements are subject to the Commission's Rules and Regulations under the Federal Power Act.

But the attempted explanation is a distinction without a difference. The contracts filed in 1962 all had been executed against a long period of commercial dealings between the parties when the Kentucky Commission was exercising sole jurisdiction and unilateral rate changes were lawful and had been so recognized by all concerned. There is no support for the court's conclusion that, by execution of new standard form

service agreements (ironically the result of a substantial unilateral rate reduction by KU approved by the *Kentucky* Commission, not the FPC) shortly after the assertion of FPC jurisdiction, KU's long standing rate-changing authority was somehow abandoned, without a hint of intent or motive, and the new contracts transformed into "fixed rate" agreements.

Consequently, following the D.C. Circuit's earlier reasoning in *Richmond* (pp. 34-35 *infra*), the contracts should be interpreted "in light of changed circumstances, to accomplish what the parties intended" in order to accommodate the change from the Kentucky Commission's jurisdiction and practice to FPC jurisdiction. The only logical interpretation is that the parties' pre-existing understanding of and practice under the contracts to permit unilateral changes in accordance with Kentucky law should be carried over to their continuing relations before the FPC, absent a clear showing of contractual language or negotiations evidencing an intent to adopt a new relationship. Neither the Commission nor the court have suggested that such a purpose existed and there is not a shred of support for such a conclusion anywhere in the pleadings or the extrinsic evidence which the FPC refused to consider.

The decision below disregards the keystone principle of the *Mobile-Sierra-Memphis* rule and establishes a conclusive presumption, allegedly required by the Federal Power Act, that any "preexisting ratemaking powers" of an electric utility not expressly preserved and delineated in unequivocally clear terms in its contracts on file with the FPC are extinguished. We dispute the conclusion that such radical surgery

on the Federal Power Act is "essential to the health of the natural gas [and power] industries", since the result can only be that "the operation was successful, but the patient died." Rather, in the present energy difficulties in which the Nation finds itself, it is essential that paramount consideration be given to this Court's recognition in *Memphis* of the Commission's obligation to help maintain the financial health of the companies they regulate under the Federal Power Act and the Natural Gas Act (358 U.S. at 113-114):

> It seems plain that Congress, in so drafting the statute, was not only expressing its conviction that the public interest requires the protection of consumers from excessive prices for natural gas, but was also manifesting its concern for the legitimate interests of natural gas companies in whose financial stability the gas-consuming public has a vital stake. Business reality demands that natural gas companies should not be precluded by law from increasing the prices of their product whenever that is the economically necessary means of keeping the intake and outgo of their revenues in proper balance; otherwise procurement of the vast sums necessary for the maintenance and expansion of their systems through equity and debt financing would become most difficult, if not impossible.

The egregious misapplication of the *Mobile-Sierra-Memphis* doctrine by the court below obliterates this Court's careful delineation of the limits of federal power exercised in the Federal Power Act and disrupts the proper balance of utility and consumer interests which is the basic objective of the Act. It is essential that the Court rectify this vital aspect of the administration of the Federal Power Act.

2. The Denial of Kentucky Utilities' Request for a Hearing on the Disputed Mobile-Sierra Issues Misinterprets This Court's Mobile Decision, Violates the Federal Power Act, and Conflicts with the Third Circuit's Rule on the Matter.

Because the issues in the *Mobile, Sierra* and *Memphis* cases had all been raised in the context of a full evidentiary hearing before the Commission, the Court had no occasion to consider whether a hearing is required when, as here, a dispute arises as to whether or not a proposed rate filing is "otherwise valid".

Kentucky Utilities unsuccessfully contended below that a hearing was essential in order to establish the intent of the parties in light of the long history of commercial relationships between them under the exclusive regulatory authority of the Kentucky Commission, the uncertainties surrounding KU's accession to FPC jurisdiction in the mid-1960's, and the understanding of KU, the FPC Staff and the Cities as to the Company's rate change authority after it had filed its contracts with the Commission and supplemented them incident to the 1965 rate reduction. It was particularly essential to explore the Commission Staff's previous interpretation of the same rate language now at issue as *not* providing for "fixed rates" (p. 9 *supra*). Affording a hearing in such disputes is an eminently fair and salutary practice, since the Commission may put the proposed rates into effect subject to later refund, thus not prejudicing the customers in any way should the Commission ultimately conclude that the unilateral rate filing was barred by the contracts between the parties. (*Mobile*, 350 U.S. at 341).

The Company also pointed out that the Commission's summary rejection of our rate filing violated the D.C. Circuit's mandate in *Mobil Oil Corp.* v. *FPC* that,

since a Commission order setting a just and reasonable rate is required by section 313(b) to be based on "substantial evidence", the Commission must afford some "mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others," i.e., "[some] process of testing and illumination ordinarily associated with adversary, adjudicative procedures." [19] It is obvious that if minimal adjudicatory type procedures are required where the Commission actually engages in ratemaking, *a fortiori* they are even more essential where the effect of Commission action is to deny a utility *any* rate increase at all by summarily rejecting its filing on the merits based on disputed contractual provisions.

Finally, KU stressed that in the only appellate decision since the *Mobile-Sierra-Memphis* decisions where the issue has been directly addressed, the Third Circuit held that where the contractual authority to file a rate increase is contested, it is "incumbent upon the Commission to conduct a hearing and determine whether the proposed increases were contractually supported." [20]

The court below rejected these arguments, and did not even acknowledge the Third Circuit's rule. It relied instead on the simplistic, and clearly erroneous, assertion that contract interpretation is a legal, not a factual matter (App. A, p. 18a *infra*). However, it is hornbook law that contract "interpretation is always a matter of fact [and] if the symbols of expression actually used *or the circumstances under which they are used are doubtful or disputed,* no one doubts that the

---

[19] *Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238, 1258, 1260 (1973).

[20] *Shell Oil Co.* v. *FPC*, 334 F.2d 1002, 1007 (3rd Cir. 1964); *cf. Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899 (3rd Cir. 1953).

issues herein are issues of fact."[21] Moreover, in applying the *Mobile-Sierra* rule in *Gulf States Utilities* v. *FPC,* the D.C. Circuit had properly recognized "the mixed questions of fact, law and policy that are raised when the dispute is concerned with the kinds of contractual arrangements and practices that the Commission must consider in determining whether a contract as a whole is of the *Mobile-Sierra* or the *Memphis* type."[22]

The court concluded that KU's filing was properly rejected without a hearing since it was "patently a nullity as a matter of substantive law", citing its earlier decision in *Municipal Light Boards of Reading and Wakefield, Mass.* v. *FPC,* 450 F.2d 1341 (1971), *cert. denied,* 405 U.S. 989 (1972). (App. A, pp. 18a-19a *infra.*) The result is to perpetuate the unfortunate dictum in that case (*id.* at 1345) which erroneously asserts that *Mobile* sanctioned the Commission's unqualified use of its summary rejection procedures in all *Mobile-Sierra-Memphis* disputes. Although *Mobile* did declare that the filing involved in that case was a "nullity" and concluded that the FPC had ample authority under the Natural Gas Act to "reject" it (350 U.S. at 347), the single, negotiated rate involved there was a "*non-suspendable* industrial rate" (*id.* at 336-37, emphasis added). Consequently, *Mobile* should be limited to its unique situation and not be distorted to permit the FPC to use summary procedures in contested

[21] 3 Corbin on Contracts § 554 (emphasis added).

[22] 518 F.2d 450, 457-458 (1975). *See also Richmond Power* and *Light of the City of Richmond, Indiana* v. *FPC,* 481 F.2d 490, 499 n. 15, citing with approval *Pacific Portland Cement Co.* v. *Ford Machinery & Chemical Corp.,* 178 F.2d 541, 553 (9th Cir. 1949).

cases where its suspension powers under the Federal Power Act and the Natural Gas Act are available.

Further, it is clear that the court's selected excerpt from *Reading and Wakefield* does not justify the Commission's action here, since that decision carefully noted that under FPC practice a "rejection" of a filing "classically is *used not to dispose of a matter on the merits,* but rather as a technique for calling on the filing party to put its papers in proper form and order." (450 F.2d at 1346, emphasis added). It stressed that its use "should mark the *clear case* of a filing that is either deficient in form or a substantive nullity", and is only "appropriate where the filing is *so deficient on its face* that the agency may properly return it to the filing party without even awaiting a responsive filing by any other party in interest" (*id.* at 1345, 1346, emphasis added). Rejection of KU's filing was obviously not appropriate under those standards. Rather, as the several uncertain Commission orders below make clear, the Company's rate filing was far from being "patently a nullity". Indeed, both the Cities and the Commission were forced to rely on certain selected extrinsic evidence and to ignore Kentucky law and the practices of the parties thereunder to support their contention that the contracts were fixed rate contracts.[23]

Finally, in *Reading and Wakefield* a principal rationale for the dictum that the FPC may reject a clearly

[23] R. 513-16; App. C, pp. 29a-30a *infra.* Faced with KU's argument that the Commission was arbitrary in its selective reliance on one bit of the long background of dealings between the parties, the court's Procrustean rejoinder was first to explain that the Commission had not relied on such evidence in its original order, but only on rehearing (App. A., p. 14a, n. 55 *infra*), and then to ignore that basis for the Commission's order (*id.* at p. 17a, n. 63).

deficient filing is that "administrative efficiency and justice are furthered by obviating any docket at the threshold rather than opening a futile docket." (*Id.*) Here, however, the summary rejection of KU's rate filing as to the Cities not only did not "obviate a docket at the threshold", since a docket was opened on the rate increase as it applied to the partial requirements customers (App. B, pp. 24a-25a *infra.*), but unnecessarily spawned the expense and delay associated with this litigation. Further, it is difficult to understand how "justice is furthered" by denying KU the opportunity to establish its authority to file its first rate increase to the Cities in 15 years, during which period they had received the benefits of several substantial rate reductions based on an interpretation of the relevant language by the Company and FPC Staff, which was communicated to the same customers, that they were not fixed rate agreements (R. 425-26). There is simply no justification under the Federal Power Act for permitting the FPC's limited authority to summarily reject certain kinds of procedurally deficient filings to be distorted to produce such an unjust result. The Court should resolve the conflict between the circuits and adopt the Third Circuit's salutary rule as best designed to carry out the basic purposes of the Federal Power Act.

3. The Commission's Refusal To Examine the Conduct of the Parties and Other Relevant Evidence Extrinsic to the Disputed Contracts Violates Its Obligations Under the Federal Power Act To Develop a Comprehensive Record in the Public Interest.

For over 30 years all of KU's eleven municipal customers have been served under standard form contracts containing a boilerplate rate provision simply incorporating KU's wholesale municipal rate then on file with the Kentucky Commission (and, in 1965, with the FPC as well). None was served under an individually negotiated contract providing a special, fixed rate such as the single contracts involved in *Mobile* and *Sierra.* Rather, KU's contractual relationship with the eleven Cities which constitute its *entire* all requirements municipal wholesale load, was generally the same as under the "tariff and service" arrangements which were the subject of the *Memphis* decision. Indeed, KU had even earlier included "going rate" language in the long form supplements to many of the customers' contracts (see p. 7 *supra*) substantially identical to the language which this Court in *Memphis* held had clearly preserved United's right to file for rate changes without its customers' consent. (358 U.S. at 105, 115.)

The rate language in the standard form contracts, both those executed before the assertion of FPC jurisdiction and the new and supplemental agreements issued in 1963 and after, has always been silent with respect to KU's right to file rate changes within the contract term. Therefore, the sole contract interpretation issue is whether the parties' silence on the matter should be interpreted as "permission", as KU contends, or "prohibition", as the Commission and the court found. If the contracts with the Cities had expressly provided that their stated rates were not subject to unilateral change by KU, or without agreement of both parties, there admittedly might have been no occasion for hearing and evidence. But since these contracts did not contain any expression either way, as to whether the specified rates were changeable or fixed, resort to evidence in determining the parties' intent is not only appropriate, but essential to a just result.

While *Memphis* admittedly involved a contract containing language which the Court interpreted as permitting the pipeline to charge its "going rate" on file from time to time, nothing in either *Memphis, Mobile* or *Sierra* suggests that whether filed rate changes are "otherwise valid" can be established *only* by a written agreement between a utility and its customers or that, if such an agreement has been executed, the authority for any changes must be found solely within its four corners, as the court below held.

The court of appeals' conclusion is directly at odds with the attention which was given to the negotiating background, industry and regulatory practices, and practical construction involved with the contracts at issue in *Mobile, Sierra* and *Memphis*.[24] Furthermore, the court of appeals' rigid application of the parol evidence rule violates the well-established principle that administrative agencies should not circumscribe their ability to carry out their public interest responsibilities by self-imposed adherence to exclusionary rules of evidence designed for judicial resolution of private disputes.

Thirty-five years ago this Court acknowledged that "it has long been settled that the technical rules for the exclusion of evidence applicable in jury trials do not apply to proceedings before federal administrative agencies in the absence of a statutory requirement that

[24] *Mobile*, 350 U.S. at 335-36, 344; *Sierra*, 350 U.S. at 351-52, *Memphis*, 358 U.S. at 144-45; *Mobile Gas Service Corp.* v. *FPC*, 215 F.2d 883, 884 (3rd Cir. 1954); *Sierra Pacific Power Co.* v. *FPC*, 223 F.2d 605, 606 (D.C. Cir. 1955); *United Gas Pipe Line Co.*, 16 F.P.C. 19, 24-25 (1956).

such rules are to be observed."[25] Not only does the Federal Power Act not require the Commission to apply such exclusionary rules, but section 308 provides that "the technical rules of evidence need not be applied" in proceedings under the Act. (App. E, p. 39a *infra*.) Furthermore, section 1.26(a) of the FPC's rules of practice and procedure mandated by section 308, and which are binding on the Commission,[26] provides that "relevant and material evidence *shall* be admissible" in all proceedings. The FPC's decision violates not only section 1.26(a), but 18 C.F.R. 35.13 as well, which clearly contemplates that a filing utility will be entitled to show the "circumstances" which provide the authority for its rate filing, of which a contract is recognized as but one possible element.

Moreover, even if the Commission's reliance on the parol evidence rule were permissible in appropriate circumstances, its application in this case should be rejected. First, the Commission and the court apply the rule in an unduly restrictive fashion which is at odds with the modern approach followed by most courts of

[25] *Opp Cotton Mills, Inc.* v. *Administrator, Dept. of Labor*, 312 U.S. 126, 155 (1941). The rationale for the rule has been succinctly stated by Judge Learned Hand as "the danger always involved in conducting [an administrative] proceeding in such a spirit, and the absence of any advantage in depriving either the [Federal Trade] Commission or ourselves of all evidence which can conceivably throw any light upon the controversy." *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378, 380 (2nd Cir. 1945).

[26] *Service* v. *Dulles*, 354 U.S. 363, 372-73 (1957); *U.S. ex rel. Accardi* v. *Shaughnessy*, 347 U.S. 260 (1954).

appeals,[27] and embodied in the Uniform Commercial Code, Section 2-202, which provides that extrinsic evidence is admissible in *all* cases to "explain or supplement" a writing, but not to "contradict" its terms. Consistent with the modern approach, the extrinsic evidence relied on by KU should have been considered to "explain and supplement" the rate provisions of the contracts, which were silent as to whether they permitted unilateral rate increases. The court of appeals' mistaken conclusion that KU sought to "contradict" the "unambiguous" terms of the contracts stems from assuming the answer to the very question at issue, *i.e.* that the language in question in fact "unambiguously designates a *fixed* rate." (App. A, p. 14a *infra*). This technique is akin to shooting first, then painting a bull's-eye around the bullet hole.

The Commission's regulatory responsibilities cannot be properly carried out within the constraints of evidentiary rules designed for judicial resolution of private disputes. As the Second Circuit has forcefully reminded the Commission:[28]

> In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public

[27] *Chase Manhattan Bank* v. *First Marion Bank*, 437 F.2d 1040 (5th Cir. 1971); *Simpson Timber Co.* v. *Palmberg Const. Co.*, 377 F.2d 380 (9th Cir. 1967); *Evenson* v. *Pubco Petroleum Corp.*, 274 F.2d 866 (10th Cir. 1960); Restatement of Contracts §235 (comment (e)), 242 (comment).

[28] *Scenic Hudson Preservation Conf.* v. *FPC*, 354 F.2d 608, 620 (2nd Cir. 1965), *cert. denied*, 384 U.S. 941 (1966).

> must receive active and affirmative protection at the hands of the Commission.
>
> * * *
>
> The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. [citing cases]

Finally, the court's refusal to consider evidence on the factual and legal background of the contracts and the practices of the parties thereunder is in direct conflict with three other *Mobile-Sierra-Memphis* decisions by different panels of the D.C. Circuit reversing FPC orders applying the *Mobile-Sierra* rule in summary proceedings. In *Sam Rayburn Dam Electric Coop.* v. *FPC*, 515 F.2d 998 (1975), the court examined "various features of the contract itself, as well as certain extrinsic material (consideration of which is proper because of the arguably ambiguous nature of the contract provisions)" and characterized as "indefensible" the Commission's contrary conclusion that "the contract unambiguously bestowed on Gulf States the power to effect unilateral rate increases through application to the FPC" (*id.* at 1003, 1005). Similarly, in the companion case of *Mid-South Electric Cooperative Asso.* v. *FPC*, the FPC was reversed because it had failed to consider the conduct of the parties to the disputed contract, the court holding that "it is a familiar principle of the law that parties may evidence a modification of the original terms of contract by their subsequent conduct, and Mid-South had no apparent reason to anticipate that the FPC would declare itself not to be bound to observe that principle in applying the *Sierra-Mobile* doctrine." (*Id.* at 1007.) The court firmly rejected the Commission's contention that its

constricted view of the scope of the *Mobile-Sierra-Memphis* doctrine was required by the Federal Power Act (*Id.* at 1009):

> The FPC has suggested no reason that the recognized law governing contracts should be ignored merely because the subject matter of a contract falls under the jurisdiction of the FPC.
>
> * * *
>
> Accordingly, we hold that FPC was under a duty, at the time of Gulf States' attempt to increase its rates with respect to Mid-South, to ascertain whether or not the proposed increase conflicted with any existing contractual arrangement between Gulf States and Mid-South. Such an inquiry would necessarily include an evaluation of Mid-South's claim that their mutual course of dealing served to effect a modification of the terms of the written contract on file with the FPC.

Last, in *Richmond Power and Light* v. *FPC*,[29] the court again looked at extensive extrinsic evidence in interpreting whether the *unambiguous* language of the contracts involved in those cases permitted unilateral rate filings. In interpreting the Richmond contract the court carefully analyzed the contract in terms of its background and purpose in an attempt to ascertain the parties' intent, including Richmond's *extra-contractual* explanation that its purpose was to tie its rate to its supplier's industrial retail rate to prevent a price squeeze in attracting new industrial business.[30] In interpreting the Anderson contract, the court applied the

[29] *Richmond Power and Light of the City of Richmond, Indiana* v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *FPC*, 414 U.S. 1068 (1973).

[30] *Id.* at 496.

normal rules of contract construcion to fit the contract to "changed circumstances" (481 F.2d at 499):

> The Commission seems to be saying that it is simply interpreting the contract in light of changed circumstances, to accomplish what the parties intended. And we have no quarrel in principle with this approach to contract interpretation.

KU believes that the court's approval of the Commission's erroneous and improper application of the parol evidence rule to the disputed contract issues below is simply another example of the conflicting and confusing signals as to proper interpretation of the *Mobile-Sierra-Memphis* doctrine which the D.C. Circuit has been giving to the Commission and the electric utilities and their customers so vitally affected by the Commission's application of that doctrine in the administration of the Federal Power Act. It is essential that this Court intercede in order to restore the proper administration of the Federal Power Act and nip in the bud the retrogression in modern administrative procedure which the decision below portends.

C. THIS COURT'S SUGGESTION IN SIERRA THAT SECTION 206(A) MIGHT PROVIDE AN AVENUE OF RELIEF FROM FIXED RATE CONTRACTS IN APPROPRIATE CIRCUMSTANCES HAS PROVED TO BE ILLUSORY.

In *Sierra* this Court sought to alleviate the impact of its decision precluding a unilateral rate increase in violation of a fixed rate contract, no matter how meritorious, by reminding the Commission that it had ample authority under section 206(a) [31] to modify such fixed rate contracts as the Commission might find were not in the public interest. As an illustration of when such

[31] App. E., p. 39 *infra*.

action under 206(a) might be appropriate, the Court suggested that "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory". *Sierra,* 350 U.S. at 355.

Unfortunately that avenue of possible relief from a fixed rate contract has thus far proved to be a dead end. On remand in the *Sierra* case the Commission refused to grant Pacific Gas & Electric a further hearing at which it could attempt to demonstrate that it was entitled to rate relief under section 206(a).[32] The restrictive interpretation of section 206(a) signalled by that decision has not yet been liberalized by the Commission, and no relief from a fixed rate contract has been granted over the past 20 years under the *Sierra* criteria. Most utilities, including KU in this case, have been deterred from seeking relief under 206(a) because of the FPC's narrow view of the scope of its authority under that section, as well as by a number of uncertainties about the *Sierra* criteria themselves. For example, a critical unresolved question is whether the *Sierra* criteria relate to a utility's entire retail and wholesale operations or only to its wholesale service subject to FPC jurisdiction. Since the portion of a utility's electric load subject to FPC jurisdiction is usually relatively small (about 10 percent in KU's case), KU and other electric utilities have not been sanguine about trying to satisfy the *Sierra* criteria in the context of their entire operations.

---

[32] *Pacific Gas & Electric Co.,* 18 F.P.C. 15 (1957), *aff'd, Pacific Gas & Electric Co.* v. *FPC,* 267 F.2d 165 (D.C. Cir. 1959).

Another restrictive aspect of the Commission's view of its authority under section 206(a) in fixed rate situations is that it appears to view the *Sierra* criteria as exclusive, rather than illustrative. Consequently, there has as yet been no indication from the Commission that it is prepared to expand the *Sierra* criteria to include other possible, equally relevant public interest considerations. Consequently, the *Sierra* criteria, originally intended as a life jacket for a utility, have been converted into a straight jacket by the Commission.

It is against that background that we urge the Court to consider carefully what we anticipate will be the FPC's opposition to this petition, namely its boilerplate argument that its repeated errors in rejecting rate filings on misapplied *Mobile-Sierra* grounds raise no significant problems worthy of this Court's attention because the Commission can always grant appropriate relief under section 206(a). Thus, on the last occasion when a petition for certiorari on a *Mobile-Sierra* issue was before the Court in 1973,[33] the Commission advised the Court as follows:[34]

> The only issue in this case, however, concerns the correct interpretation of the particular language in the two contracts, and that issue is not of sufficient general importance to warrant review by this Court. The decision below will not, in the Commission's judgment, seriously interfere with the performance of its regulatory responsibilities under the Federal Power Act. As the court below

---

[33] *Indiana and Michigan Electric Company* v. *Anderson Power and Light of the City of Anderson, Indiana; Richmond Power and Light of the City of Richmond, Indiana;* and *Federal Power Commission* (Oct. Term 1973, No. 73-511).

[34] "Memorandum For The Federal Power Commission In Opposition" (November 1973), p. 5.

recognized (Pet. App. 15-16), the Commission remains free to initiate a proceeding under Section 206(a) of the Act, 16 U.S.C. 824(e)(a), to determine whether the rates under the contracts—*i.e.*, the rates under Tariff I.P.—are "unjust, unreasonable, unduly discriminatory or preferential * * *." If the Commission so determines, it may by order fix "just and reasonable" rates for the sales.

While the FPC may not view its misapplication of the *Mobile-Sierra-Memphis* doctrine as interfering with its administration of the Federal Power Act, its "aimless, erratic and confused" [35] decisions are seriously interfering with the operation and financial health of Kentucky Utilities and other electric utilities subject to the Commission's jurisdiction. It is no solace for such utilities to be extended a Catch-22 invitation from the Commission to invoke the procedures of section 206 (a) which the Commission itself has failed to utilize in a meaningful way for 20 years. More important, in the period subsequent to the FPC's representation to this Court in November 1973 as to the insignificance of the *Mobile-Sierra-Memphis* problem to the administration of the Federal Power Act, such issues have been raised in at least two dozen separate dockets involving a like number of utilities (App. G, pp. 42a-43a *infra.*). Consequently, in light of the FPC's constricted application of section 206(a) in cases where fixed rate contracts otherwise bar needed rate relief, it is absolutely essential that the Court provide much needed guidance to the Commission and the courts of appeals on the proper application of its long-standing *Mobile-Sierra-Memphis* doctrine, perhaps even including clarification of the *Sierra* 206(a) criteria.

---

[35] *Borough of Lansdale* v. *FPC*, p. 14, n. 15 *supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME C. MUYS
DEBEVOISE & LIBERMAN
806 15th Street, N.W.
Washington, D.C. 20005
(202) 393-2080

MALCOLM Y. MARSHALL
OGDEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40270
(502) 582-1601

Attorneys for Kentucky, Utilities Company, Petitioner

April 7, 1976

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1290

APPALACHIAN POWER COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

CITIES OF DANVILLE, RADFORD, BEDFORD, SALEM, RICHLANDS and MARTINSVILLE, VIRGINIA, and VIRGINIA POLYTECHNIC and STATE UNIVERSITY, *Intervenors*

No. 73-2085

KENTUCKY UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION, *Respondent*

ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, ET AL., *Intervenors*

Petitions for Review of Orders of the Federal Power Commission.

Argued December 9, 1974
Decided January 8, 1976

Peter J. Schlesinger for petitioner in No. 73-1290.

Jerome C. Muys, with whom *Thomas M. Debevoise* was on the brief, for petitioner in No. 73-2085.

Thomas M. Walsh and *A. Lee Wallace,* Attorneys, Federal Power Commission, with whom *Leo E. Forquer,* Gen-

eral Counsel, and *George W. McHenry,* Solicitor, Federal Power Commission, were on the brief, for respondent.

Northcutt Ely, with whom *Frederick H. Ritts* was on the brief, for intervenors Cities and Virginia Polytechnic Institute and State University in No. 73-1290.

Sandra J. Strebel for intervenors Electric and Water Plant Board of the City of Frankfort, et al., in No. 73-2085.

Before LUMBARD,* *Senior Circuit Judge* for the Second Circuit, and TAMM and ROBINSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

Concurring opinion filed by *Circuit Judge* LUMBARD.

ROBINSON, *Circuit Judge:* In these consolidated cases, petitioners Appalachian Power Company (AP) and Kentucky Utilities Company (KU), public electric utilities regulated under the Federal Power Act,[1] seek review of orders of the Federal Power Commission rejecting increased rates proposed for electric power to be supplied certain customers pursuant to preexisting contracts. Petitioners contend that the Commission erroneously construed the contracts as fixed-rate agreements, as such protected by the Act against unilateral change. We sustain the Commission's interpretations and affirm the orders under review.

I. THE APPLICABLE PRINCIPLES

At the outset, we pause briefly to consider three decisions of the Supreme Court staking out the principles governing resolution of issues of the kind presented here. The first, *United Gas Pipe Line Company* v. *Mobile Gas*

---

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] Act of June 10, 1920, ch. 285, 41 Stat. 1063, Act of Aug. 26, 1935, ch. 687, tit. II, 49 Stat. 838, as amended, 16 U.S.C. §§ 791a *et seq.*

Service Corporation,[2] involved a federally regulated natural gas pipeline bound by a ten-year contract to supply a distributor at a particular rate. During the term of the agreement the pipeline filed with the Commission a new rate schedule lacking the concurrence of its customer and purporting to fix the rate above that called for by the contract. The Court noted that the Natural Gas Act[3]—the relevant provisions of which "are in all material respects substantially identical to the equivalent provisions of the" Federal Power Act[4]—"expressly recognizes that rates to particular customers may be set by individual contracts"[5] and "evinces no purpose to abrogate private rate contracts as such."[6] After analyzing the statutory text,[7] the Court concluded "that the Natural Gas Act gives a natural gas company no power to change its contracts unilaterally,"[8] and accordingly held "that the new schedule filed by [the pipeline] was a nullity insofar as it purported to change the rate set by its contract with [the distributor] and that the contract rate remained the only lawful rate."[9]

---

[2] 350 U.S. 332, 76 S.Ct. 373, 100 L.Ed. 373 (1956).

[3] Act of June 21, 1938, ch. 556, 52 Stat. 821, as amended, 15 U.S.C. §§ 717 *et seq.* (1970).

[4] *FPC* v. *Sierra Pac. Power Co.,* 350 U.S. 348, 353, 76 S.Ct. 368, 371, 100 L.Ed. 388, 394 (1956).

[5] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp., supra* note 2, 350 U.S. at 338, 76 S.Ct. at 378, 100 L.Ed. at 383. See also *Permian Basin Area Rate Cases (Continental Oil Co.* v. *FPC),* 390 U.S. 747, 822, 88 S.Ct. 1344, 1388-1389, 20 L.Ed. 2d 312, 367 (1968); *Borough of Lansdale* v. *FPC,* 161 U.S. App.D.C. 185, 194, 494 F.2d 1104, 1113 (1974).

[6] *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp., supra* note 2, 350 U.S. at 338, 76 S.Ct. at 377-378, 100 L.Ed. at 383.

[7] *Id.* at 338-345, 76 S.Ct. at 377-382, 100 L.Ed. at 383-387.

[8] *Id.* at 347, 76 S.Ct. at 382, 100 L.Ed. at 388.

[9] *Id.* See also *Tyler Gas Serv. Co.* v. *FPC,* 101 U.S.App.D.C. 184, 188, 247 F.2d 590, 594, *cert. denied,* 355 U.S. 895, 78 S.Ct. 263, 2 L.Ed.2d 193 (1957).

The second case, *Federal Power Commission* v. *Sierra Pacific Power Company*,[10] decided the same day, presented a cognate issue under the parallel provisions of the Federal Power Act.[11] The question was whether the Commission could raise the rate established by a supply contract between a regulated electric utility and a distributor on a finding that the new rate was not unreasonably high. The Court, extending *Mobile's* Gas Act interpretation to the Power Act's counterparts[12] held that "neither [the utility's] filing of the new rate nor the Commission's finding that the new rate was not unlawful was effective to change [the utility's] contract with" the distributor.[13]

---

[10] *Supra* note 4.

[11] See text *supra* at note 4. Public electric utilities are required to file with the Commission all rates, and all contracts affecting rates, pertaining to sales within the Commission's jurisdiction. Federal Power Act § 205(c), 16 U.S.C. § 824d(c) (1970). Changes in previously filed rates must be submitted at least 30 days before they are slated to go into effect, *id.* § 205(d), 16 U.S.C. § 824(d) (1970), and the Commission may suspend operation of the new rate for a maximum five-month period pending an investigation as to its reasonableness. *Id.* § 205(e), 16 U.S.C. 824d (e)((1970). The Commission may also modify any rate upon a determination that it is "unjust, unreasonable, unduly discriminatory or preferential. . . ." *Id.* § 206(a), 16 U.S.C. § 824e(a) (1970).

[12] *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 353, 76 S.Ct. at 371, 100 L.Ed. at 394.

[13] While not a decisional consideration in the cases at bar, we call attention to the fact that the *Mobile-Sierra* interpretation "in no way impairs the regulatory powers of the Commission," *United Gas Pipe Line Co.* v. *Mobil Gas Serv. Corp.*, *supra* note 2, 350 U.S. at 344, 76 S.Ct. at 381, 100 L.Ed. at 386; see also *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 353-355, 76 S.Ct. at 371-372, 100 L.Ed. at 394, because the Commission can revise any rate when "necessary in the public interest." Federal Power Act § 201(a), 16 U.S.C. § 824(a) (1970). See also *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 355, 76 S.Ct. at 371, 100 L.Ed. at 395. And see also

The third case, decided two years later, fell outside the scope of the *Mobile-Sierra* doctrine. In *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*,[14] service contracts between a gas pipeline and a distributor-customer provided that

> [a]ll gas delivered hereunder shall be paid for by Buyer under Seller's Rate Schedule, . . . *or any effective superseding rate schedules*, on file with the Federal Power Commission. This agreement in all respects shall be subject to the applicable provisions of such rate schedules and to the General Terms and Conditions attached thereto and filed with the Federal

---

FPC v. *Louisiana Power & Light Co.*, 406 U.S. 621, 646, 92 S.Ct. 1827, 1841, 32 L.Ed.2d 368, 388 (1972); *Permian Basin Area Rate Cases (Continental Oil Co.* v. *FPC)*, *supra* note 5, 390 U.S. at 820-821, 88 S.Ct. at 1388, 20 L.Ed.2d at 366. Thus, even though the proceeding eventuating in the *Sierra* decision was initiated by a unilateral rate-raise filing invoking § 205 of the Federal Power Act, 16 U.S.C. § 824d (1970), the Court remanded the case for an inquiry under § 206, 16 U.S.C. § 824e (1970); see *Borough of Lansdale* v. *FPC*, *supra* note 5, 161 U.S.App.D.C. at 198, 494 F.2d at 1117, to determine whether the contract rate was "so low as to have an adverse effect on the public interest." *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 355, 76 S.Ct. at 372, 100 L.Ed. at 395. See also *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 391 n.4, 94 S.Ct. 2315, 2337 n.4, 41 L.Ed.2d 151, 153 n.4 (1974). The Commission has authority to change agreed rates, however, only "in circumstances of unequivocal public necessity," *Permian Basin Area Rate Cases (Continental Oil Co.* v. *FPC)*, *supra* note 5, 390 U.S. at 822, 88 S.Ct. at 1388-1389, 20 L.Ed.2d at 367; see also *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 353-355, 76 S.Ct. at 371-373, 100 L.Ed. at 394-395; *United Gas Pipe Line Co.* v. *Mobile Gas Corp.*, *supra* note 2, 350 U.S. at 344-347, 76 S.Ct. at 381-382, 100 L.Ed. at 386-388, and "[t]he conditions precedent to the Commission's exercise of its power under § 206(a) is a finding that the existing rate is 'unjust, unreasonable, unduly discriminatory or preferential.'" *FPC* v. *Sierra Pac. Power Co.*, *supra* note 4, 350 U.S. at 353, 76 S.Ct at 371, 100 L.Ed. at 394.

[14] 358 U.S. 103, 79 S.Ct. 194, 3 L.Ed.2d 153 (1958).

> Power Commission which are by reference made a part hereof.[15]

The Court held that this provision did not set "a single fixed rate as in *Mobile,* but . . . what in effect amounted to its current 'going' rate,"[16] and that "[c]ontractually this left [the pipeline] free to change its rates from time to time, subject, of course, to the procedures and limitations of the Natural Gas Act."[17] As the Court explained, "[t]he important and indeed decisive difference between this case and *Mobile,*[18] is that in *Mobile* one party to a contract was asserting that the Natural Gas Act somehow gave it the right unilaterally to abrogate its contractual undertaking, whereas here [the pipeline] seeks simply to assert, in accordance with the procedures specified by the Act, rights expressly reserved to it by contract."[19] Consequently, the pipeline's unilateral rate elevation was fully compatible with the parties' contract and therefore valid.[20]

As this court fairly recently observed,

> [t]he rule of *Sierra, Mobile* and *Memphis* is refreshingly simple: The contract between the parties governs the legality of the filing. Rate filings consistent

---

[15] *Id.* at 105, 79 S.Ct. at 196, 3 L.Ed.2d at 156 (emphasis by the Court).

[16] *Id.* at 110, 79 S.Ct. at 198, 3 L.Ed.2d at 159.

[17] *Id.*

[18] And, of course, *Sierra* as well.

[19] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div., supra* note 14, 358 U.S. at 112, 79 S.Ct. at 199, 3 L.Ed.2d at 160.

[20] *Id.* at 112-133, 79 S.Ct. at 199-200, 3 L.Ed.2d at 160-161. See also *Wisconsin* v. *FPC,* 373 U.S. 294, 304, 83 S.Ct. 1266, 1272, 10 L.Ed.2d 357, 365 (1963); *Sunray Mid-Continent Oil Co.* v. *FPC,* 364 U.S. 137, 154-155, 80 S.Ct. 1392, 1402, 4 L.Ed. 2d 1623, 1635 (1960).

> with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.[21]

In the past we have had occasion, in investigating the congruence of contract provisions and unilateral rate increases, to apply the *Mobile-Sierra-Memphis* principles thus summarized.[22] Today, in the cases at bar, we must do so once again.

II. Appalachian Power Company's Petition

AP filed with the Commission unilateral increases in its rates for electric power to be sold to its wholesale customers. Intervenors,[23] customers in Virginia, moved to reject the filing on the ground that the proposed increases violated their allegedly fixed-rate contracts with AP and thus clashed with the *Mobile-Sierra* doctrine. In response, AP averred that the parties had assumed that Virginia law applied to the service agreements and that, construed accordingly, they were beyond the ambit of *Mobile-Sierra.* The Commission, unimpressed by that argument, granted the motions.[24]

---

[21] *Richmond Power & Light* v. *FPC,* 156 U.S.App.D.C. 315, 318, 481 F.2d 490, 493, *cert. denied,* 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed.2d 473 (1973).

[22] See *Gulf States Utils. Co.* v. *FPC,* —— U.S.App.D.C. ——, 518 F.2d 450 (1975), *Sam Rayburn Dam Elec. Cooperative* v. *FPC,* —— U.S.App.D.C. ——, 515 F.2d 998 (1975); *Richmond Power & Light* v. *FPC, supra* note 21; *Public Serv. Comm'n* v. *FPC,* No. 24,716 (D.C. Cir. Mar. 25, 1975), at 57-62, 66-76; *Borough of Lansdale* v. *FPC, supra* note 5; *Tyler Gas Serv. Co.* v. *FPC, supra* note 9, 101 U.S.App.D.C. at 187-188, 247 F.2d at 593-594; *Portsmouth Gas Co.* v. *FPC,* 101 U.S.App.D.C. 99, 102-103, 247 F.2d 90, 93-94 (1957); *Cincinnati Gas & Elec. Co.* v. *FPC,* 101 U.S.App.D.C. 1, 6, 246 F.2d 688, 693 (1957).

[23] The Cities of Bedford, Danville, Martinsville, Radford, Richlands and Salem, Virginia, and the Virginia Polytechnic Institute and State University.

[24] *Appalachian Power Co.,* 48 F.P.C. 1366 (1972) (original order), 49 F.P.C. 387 (1973) (order on rehearing).

As the Commission found, each of the contracts in question stipulates that the "[c]ustomer agrees to pay the Company monthly for electric energy delivered" thereunder at an expressly designated rate.[25] The Commission, finding no language reflecting an intent to permit unilateral changes,[26] deemed Virginia law inapposite.[27] On rehearing, the Commission adhered to that position,[28] and to its conclusion that the agreements established fixed-rates protected by *Mobile-Sierra* against unilateral increases.[29]

The sole claim of error advanced here is the Commission's refusal to consider Virginia law in deciding whether the contracts fell within *Mobile-Sierra* or instead within *Memphis*. AP told the Commission that the parties had taken for granted the applicability of Virginia law to their agreements, and that under the law of that state "fixed and unalterable rate contracts were prohibited and upon the exercise of regulatory authority, [AP] has the unquestioned right and power to file changes in its contract rates."[30] On that basis, AP urged the Commission to read the contracts as going-rate compacts,[31] and now contends that our decision in *Richmond Power & Light* v. *Federal Power Commission*[32] requires that result.[33]

We hold that the Commission properly treated Virginia law as irrelevant to interpretation of the contracts in suit.[34] To be sure, the parties are free to forge a going-

---

[25] *Appalachian Power Co., supra note* 24, 48 F.P.C. at 1367 (original order). Each contract, immediately following this provision, specified unqualifiedly the particular rate to be charged. *Id.*

[26] On this score the Commission said:

> [T]here is no language in the contracts allowing unilateral rate increases. Furthermore, there is no language giving any indication that the parties even contemplated that these contracts permitted unilateral increases in rates.

Id.

[27] *Id.* The Commission did, however, institute a § 206(a) investigation. *Id.* at 1368. See note 11 *supra*. That proceeding was recently dismissed. *Appalachian Power Co.*, —— F.P.C. —— (June 9, 1975).

[28] *Appalachian Power Co., supra* note 24, 49 F.P.C. at 388 (order on rehearing).

[29] *Id.* The original order was amended, however, to enable AP's filing as to monthly deliveries in excess of the quantity of power which the City of Martinsville was entitled to receive under its contract. *Id.* That modification is not in issue here.

[30] *Appalachian Power Co., supra note* 24, 48 F.P.C. at 1367 (original order). In support of that proposition, AP relied on *Town of Victoria* v. *Victoria Ice, Light & Power Co.*, 134 Va. 134, 114 S.E. 92 (1922); *Commonwealth ex rel. Page Milling Co.* v. *Shenandoah River Light & Power Corp.*, 135 Va. 547, 115 S.E. 695 (1925). *Id.*

[31] *Appalachian Power Co., supra* note 24, 48 F.P.C. at 1367 (original order).

[32] *Supra* note 21.

[33] AP also argues that the Commission departed from its earlier ruling in *Philadelphia Elec. Co.*, 49 F.P.C. 10 (1973), *modified and vacated in part sub nom. Borough of Lansdale* v. *FPC*, *supra* note 5, wherein the Commission announced its "intent to strictly construe . . . existing [fixed-rate] contracts so as to permit no enlargement of rights or obligations thereunder absent a clear showing of necessity to meet the public interest." *Id.* at 12. On rehearing of the proceeding under review, the Commission pointed out that, with a single exception not pertinent here, intervenors "do not seek to enlarge any right contained in the contracts but rather allege that [AP] is unilaterally filing rates in apparent violation of the fixed rate provisions of their respective contracts." *Appalachian Power Co., supra* note 24, 49 F.P.C. at 388 (order on rehearing). We deem that a suffiicent answer to AP's contention and, indeed, the only answer that would pass muster under *Mobile-Sierra*.

[34] Even if Virginia law were applicable, it is not at all clear that AP would be helped. AP does not claim that Virginia law inexorably permits unilateral rate increases, or that it confers upon public utilities the unconditional right to abrogate contractual obligations. The prohibition on "fixed and unalterable rate contracts" may

rate agreement by a reference to state-law principles which impart that effect.[35] But it is well settled that "[i]n the absence of ambiguity the intent of the parties to a contract must be ascertained from the language thereof without resort to parol evidence or extrinsic circumstances."[36] Here the service agreements unequivocably specify the rates chargeable,[37] and all that remains is "the question

mean simply that all contracts are subject to revision "in the public interest," *Commonwealth ex rel. Page Milling Co.*, v. *Shenandoah River Light & Power Corp.*, *supra* note 30, 115 S.E. at 702, a position thoroughly harmonious with federal law. See note 13 *supra*. We make no attempt to resolve the question, however, for in this case we affirm the Commission irrespective of the Virginia law.

[35] See *Richmond Power & Light* v. *FPC*, *supra* note 21, 156 U.S. App.D.C. at 319-326, 481 F.2d at 494-501. We hasten to add that, in instances of that kind, state law assumes a role only because the parties agree that it shall. Put another way, state law is relevant only to the extent intended by the parties. As the Commission held, *Appalachian Power Company*, *supra* note 24, 48 F.P.C. at 388 (order on rehearing), neither state law nor conflict-of-laws principles summoning state law operate of their own force upon contracts subject to the Commission's regulatory jurisdiction. See *Duke Power Co.* v. *FPC*, 130 U.S.App.D.C. 389, 393-397, 401 F.2d 930, 934-938 (1968).

[36] *Simpson Bros.* v. *District of Columbia*, 85 U.S.App.D.C. 275, 279, 179 F.2d 430, 434 (1949), *cert. denied*, 338 U.S. 911, 70 S.Ct. 350, 94 L.Ed. 561 (1950). See also *Clayman* v. *Goodman Properties, Inc.*, —— U.S.App.D.C. ——, 518 F.2d 1026, 1034 (1973); *E.P. Hinkel & Co.* v. *Manhattan Co.*, 165 U.S.App.D.C. 140, 143, 506 F.2d 201, 204 (1974); *Borough of Lansdale* v. *FPC*, *supra* note 5, 161 U.S.App.D.C. at 189, 494 F.2d at 1108; *News Union* v. *NLRB*, 129 U.S.App.D.C. 272, 277, 393 F.2d 673, 678 (1968); *Vakas* v. *Manuel*, 114 U.S.App.D.C. 368, 369, 316 F.2d 369, 370 (1963); *H. Herfurth, Jr., Inc.* v. *United States*, 66 App.D.C. 220, 225, 85 F.2d 719, 724 (1936); *Downs v. Bankhead*, 44 App.D.C. 101, 105 (1915); *Tyssowski* v. *F.H. Smith Co.*, 35 App.D.C. 403, 407 (1910)

[37] See note 25 *supra* and accompanying text. In this crucial respect the instant case differs from *Sam Rayburn Dam Elec. Cooperative* v. *FPC*, *supra* note 22. There we referred to extrinsic material "because of the arguably ambiguous nature of the contract provisions." —— U.S.App.D.C. at ——, 515 F.2d at 1003.

whether [they] reserved to [AP] the power to make rate changes" without customer concurrence.[38] The Commission could find nothing in the contracts explicitly conferring that authority or indicating that such authority was contemplated.[39] Our attention has not been directed to any language susceptible to the construction that the rate may be altered while the contracts subsist. In these circumstances, the parties' rights and liabilities viz-a viz the designated rate must be determined from the contracts as written,[40] and the *Mobile-Sierra* proscription comes into full play.[41]

Our decision in *Richmond Power & Light* does not support the thesis that state law may confer contractual permission to revise unequivocal rate-fixing provisions. There the agreements under scrutiny expressly adopted the rate set in a tariff on file with a state regulatory agency.[42] That internal reference drew state law into the process of ascertaining whether unilateral rate raises were envisioned.[43] In the instant case, however, the contracts contain no hint whatever that state law is to affect the price that AP can exact.[44] Rather, AP would reach outside the unambiguous contracts for an argument seeking to impart uncertainty, and then again utilize the extrinsic

[38] *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, *supra* note 14, 358 U.S. at 114, 79 S.Ct. at 200, 3 L.Ed.2d at 161. See also *Gulf States Utils. Co.* v. *FPC*, *supra* note 22, —— U.S.App. D.C. at ——, 518 F.2d at 454-455.

[39] See note 26 *supra*.

[40] Compare *Gulf States Utils. Co.* v. *FPC*, *supra* note 22, —— U.S.App.D.C. at ——, 518 F.2d at 454-455; *Sam Rayburn Dam Elec. Cooperative* v. *FPC*, *supra* note 22, —— U.S.App.D.C. at ——, 515 F.2d at 1002-1003. See also Part I *supra*.

[41] See Part I *supra*.

[42] 156 U.S.App.D.C. at 319, 323-324, 481 F.2d at 494, 498-499.

[43] *Id.* at 319-326, 481 F.2d at 494-501.

[44] See note 26 *supra*.

material to resolve the so-called doubt.[45] Well settled principles preclude both the Commission and this court from endorsing that technique.[46]

III. Kentucky Utilities Company's Petition

KU filed an increased rate which it proposed to charge for power supplied intervenors, eleven all-requirements municipal wholesale customers in Kentucky.[47] Intervenors urged the Commission to reject the filing as discordant with their contracts with KU, and consequently at odds with *Mobile-Sierra*. The Commission agreed.[48] KU sought rehearing, claiming that *Richmond Power & Light* mandated a determination of the parties' contractual intent in accordance with Kentucky law. The Commission distinguished *Richmond Power & Light* and spurned KU's argument.[49]

---

[45] See text *supra* at notes 30-33.

[46] See cases cited *supra* note 36.

[47] The intervenors are the Cities of Bardstown, Falmouth, Madisonville and Nicholasville, the Electric & Water Plant Board of Frankfort, the City Utilities Commission of Barbourville, Bardwell City Utilities, the Electric Plant Board of Benham, the City Utilities Commission of Corbin, and the Municipal Light and Water Plant of Providence; and Berea College, serving the City of Berea at retail. The filing also covered service provided to the City of Paris, a partial-requirements customer, and Old Dominion Power Company, KU's wholly-owned subsidiary, applications not involved in the present review.

[48] *Kentucky Utils. Co.*, 49 F.P.C. 1470 (1973) (original order).

[49] *Kentucky Utils Co.*, 50 F.P.C. 537 (1973) (first rehearing order). In this order the Commission also instituted a § 206(a) investigation. *Id.* at 538-539. See note 11 *supra*. The Commission agreed with an alternative argument by Kentucky—that application of the fixed-rate provision should be limited to the maximum commitment specified in the agreements—and accordingly accepted the filing to the extent that it pertained to any excess deliveries. *Id.* Intervenors challenged this ruling on the ground of inconsistency with their contracts. The Commission ultimately took this position and rejected the filing in its entirety as to intervenors. *Kentucky Utils. Co.*, 50 F.P.C. 1120 (1973) (second rehearing order). See text *infra* at notes 64-66.

The Commission found that intervenors' current contracts with KU uniformly provide that

> [e]ach month the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to customer during the preceding month or bi-month determined in accordance with Rate Schedule WPS-3R,[50] which is made part of this contract.[51]

The Commission concluded upon "[a] review of the contracts between [KU] and the municipal all-requirements customers[,] . . . that they are in fact fixed-rate contracts without any provision for unilateral changes in the specified rates during the term of the contracts."[52] In this court, KU contends that the Commission should have looked to state law, that the parties' antecedent conduct demonstrates that they contemplated going-rate agreements, and that KU was entitled to an evidentiary hearing on the issue of its contractual authority to change rates unilaterally. We disagree with KU on all counts.

---

[50] Until 1962, KU was regulated exclusively by the Public Service Commission of Kentucky. In that year, KU filed its wholesale contracts with the Federal Power Commission at the latter's request. The contracts then called for a lower optimal rate, designated "WPS-5," which the Kentucky agency had approved for nine of KU's wholesale customers upon execution of new service agreements. The WPS-5 rate, offered only on a five-year initial term basis, displaced an earlier WPS-2 rate available on an annual basis. In 1965, KU filed with both regulatory bodies a new and lower rate, WPS-3, which KU later withdrew and for it substituted rate WPS-3R. KU's current effective contracts with intervenors—those which it desires to unilaterally revise upward—were entered into during the period 1963-72, and thus specify either the WPS-5 or the WPS-3R rate.

[51] *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 537-538 (first rehearing order).

[52] *Kentucky Utils. Co., supra* note 48, 49 F.P.C. at 1471 (original order). On rehearing the Commission reiterated this view. *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 537 (first rehearing order).

KU points out that the agreements now in force had their genesis in earlier contracts made prior to the Commission's assertion of federal regulatory jurisdiction over KU's wholesale transactions.[53] Since those agreements were fashioned during the era of state regulation, KU theorizes that they should be construed conformably to the law of Kentucky, the regulating state, which assertedly allowed unilateral rate increases.[54] KU says further that during that period Kentucky authorities permitted KU to make rate changes unilaterally and that its wholesale customers did not object. These considerations, KU argues, demonstrate that the parties anticipated unilateral elevations in the rates set by the current contracts, or at least developed an issue as to contractual intent necessitating an evidentiary hearing.

We think the Commission rightly held that state law had no proper role in the process of interpreting the contracts.[55] Each agreement in force when KU filed for the rate increases in issue was executed after the Commission assumed jurisdiction over the sales in question, or after it became evident that the Commission was endeavoring to do so.[56] In each instance the agreement unambiguously designates a fixed rate.[57] There is no reservation of a

---

[53] See note 50 *supra*. KU informs us that service to its municipal customers was inaugurated in the 1940's.

[54] Since we find this contention unacceptable, we do not reach the question whether Kentucky law sustains KU's theory.

[55] It is urged that the Commission itself relied on a variety of extrinsic evidence, and therefore should not ignore state law and other evidence outside the contracts. The Commission did have occasion to discuss the parties' conduct, *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 538 (first rehearing order), but only in response to KU's arguments in its petition for rehearing. The original decison left unaltered was based solely on the contract language. See text *supra* at notes 50-52.

[56] See note 50 *supra*.

[57] See text *supra* at note 51.

right to alter the contract unilaterally, nor any reference to rate changes or to procedures for such changes.[58] By the same token, there is no basis upon which Kentucky law might be applied to contradict the unmistakable terms of the contracts in regard to rates.[59] It is equally clear that intervenors' alleged acquiescence in unilateral rate revisions before the current agreements were formulated encounters the same legal obstacles.[60]

---

[58] KU does not point to any contract language having these effects.

[59] See text *supra* at notes 35-41. Throughout these proceedings, the Commission has consistently relied on the plain language of the agreements. The Commission declined to take the parties' conduct into account in resolving the excess-demand issue, see text *infra* at notes 64-65, because "only [KU's] contracts, as filed with the Commission, along with any properly filed and accepted amendments, can be regarded as embodying the presently effective contractual rates, terms and conditions." *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 1120 (order on second rehearing).

[60] The conduct upon which KU relies occurred *prior* to execution of any of the current contracts. We have admonished "that '[w]hen two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.' " *Clayman* v. *Goodman Properties, Inc., supra* note 36, —— U.S.App.D.C. at ——, 518 F.2d at 1033, quoting *Murray* v. *Lichtman*, 119 U.S.App.D.C. 250, 252, 339 F.2d 749, 751 (1964), in turn quoting 3 Corbin, Contracts § 573 (1960). See also *Gibson* v. *United States*, 106 U.S.App.D.C. 10, 12-13, 268 F.2d 586, 588-589 (1959). To be carefully distinguished is the principle that parties may modify their contractual arrangements by *subsequent* conduct, *Sam Rayburn Dam Elec. Cooperative* v. *FPC, supra* note 22, —— U.S.App.D.C. at ——, 515 F.2d at 1008-1009. See also *Gulf States Utils. Co.* v. *FPC, supra* note 22, —— U.S.App.D.C. at ——, 518 F.2d at 455-459. As already stated, the events upon which KU rests are not of the latter character.

We detect no inconsistency between these conclusions and our holding in *Richmond Power & Light*. As the Commission stated:

> [T]he *Richmond* case involved a contract which was entered into when it was contemplated that the Federal Power Commission might attain jurisdiction over the agreement. The court in *Richmond* stated that Indiana law must apply in executing the agreement because the parties specifically stated that the energy charge would be "at the rate and under the provisions of Company's (I & M) Tariff I.P. as regularly filed with the Public Service Commission of Indiana. . . ." There is no such language in the present agreement between KU and the municipal customers. . . .
>
> None of the municipal contracts refer to the rate on file with the Kentucky Commission. The parties specifically state that the rates are to be determined with reference to either Rate Schedules WPS-5 or WPS-3R.[61] There is no indication of intent that the Kentucky law should apply and therefore the *Richmond* case is not controlling.
>
> Likewise, *Anderson Power and Light of the City of Anderson, Indiana* v. *FPC*,[62] . . . is not controlling. In *Anderson*, the court made reference to contracts that were on file only with the state commission. whereas in this case the relevant contracts are on file with this Commission. Moreover, in *Anderson*, the court ruled that since the contract was entered into in 1957, the parties intended that Indiana law should apply and therefore an unilateral filing would not be allowed. The present contracts were entered into in 1963, 1965, 1969 or 1970. . . . KU began filing on September 7, 1962, at the Commission's request. While the Commission's attempt to assert jurisdiction over the agreements was not finally affirmed until 1965, KU and the parties must have assumed the Commission might have jurisdiction since they filed the agreements with the Commission

[61] See note 50 *supra*.

[62] A companion case to *Richmond Power & Light* v. *FPC*, *supra* note 21.

> and with the Kentucky Commission. Therefore, *Anderson* is not controlling and the instant agreements are subject to the Commission's Rules and Regulations under the Federal Power Act.[63]

We perceive no need to elaborate on that explanation.

For similar reasons, we sustain the Commission's ultimate ruling that the stated contract rate was applicable to KU's sales irrespective of the volume of the purchases.[64] As elucidated by the Commission,

> [e]ach contract in question contains the following clause:
>
> "The Customer may from time to time cause to be increased the amount of energy to be delivered stating the amount of additional energy desired, such request to be made at least 90 days prior to the time such additional energy is required by the Customer."
>
> This language clearly shows that the Company has agreed to furnish to its customers, upon reasonable notice, their total electric service requirement without having to amend the contracts. Therefore, the amounts we consider to be in excess of the contract demand (and therefore outside the parameters of the fixed rate contract) [65] were in fact covered by the provisions of the contract. Such a construction is compelled by the above-quoted language which clearly contemplates increases in contract demand.[66]

[63] *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 537-538 (order on first rehearing). The Commission also advanced, as an additional basis for rejecting KU's contention, the view that the going-rate character of the contracts was evinced by KU's own conduct. Since we accept as valid the Commission's first reason, we have no occasion to consider the second.

[64] See note 49 *supra*.

[65] See note 49 *supra*.

[66] *Kentucky Utils. Co., supra* note 49, 50 F.P.C. at 1120-1121 (order on second rehearing). Compare *Gulf States Utils. Co.* v. *FPC, supra* note 22, —— U.S.App.D.C. at ——, 518 F.2d at 455-456.

We have no cause to quarrel with that course of reasoning.[67]

Lastly, we find wanting KU's complaint that the Commission erred in not affording an evidentiary hearing at which the circumstances surrounding execution of the contracts might have been explored. The obvious answer is that KU presented no material factual issue for investigation at such a hearing.[68] Construction of unambiguous features of a written contract is a legal problem;[69] "the legal effect of reasonably clear terms of a contract," we have said, "is a question of law. . . ."[70] We have also compared a motion to reject a rate-increase filing with "a motion to dismiss on the face of the pleading."[71] and we have recognized the Commission's authority to turn down a filing that

[67] "[W]here the [Commission's] decision involves the interpretation of the parties' intent as revealed in the language of a contract, it is proper to defer to the Commission's expertise if its decision is 'amply supported both factually and legally.'" *Gulf States Utils. Co.* v. *FPC*, *supra* note 22, —— U.S.App.D.C. at ——, 518 F.2d at 457, quoting *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Div.*, *supra* note 14, 358 U.S. at 114, 79 S.Ct. at 201, 3 L.Ed.2d at 161. We are satisfied that the Commission's holding on this point meets that test.

[68] Compare *Citizens for Allegan County, Inc.* v. *FPC*, 134 U.S. App.D.C. 229, 232, 414 F.2d 1125, 1128 (1969); *Municipal Light Bds.* v. *FPC*, 146 U.S.App.D.C. 294, 299, 450 F.2d 1341, 1346 (1971), *cert. denied*, 405 U.S. 989, 92 S.Ct. 1251, 31 L.Ed.2d 455 (1972).

[69] *Clayman* v. *Goodman Properties, Inc.*, *supra* note 36, —— U.S.App.D.C. at ——, 518 F.2d at 1034, and cases cited in note 45 thereof.

[70] *Id.*, and cases cited in note 46 thereof.

[71] *Municipal Light Bds.* v. *FPC*, *supra* note 68, 146 U.S.App.D.C. at 299, 450 F.2d at 1346.

is "patently a nullity as a matter of substantive law."[72] As the Commission held, KU's filing plainly was in that category.

The orders under review are

Affirmed.

[72] *Id.* We have pointed out that one example of such a nullity is a filing in violation of *Mobile-Sierra*. *Id.* See also *Richmond Power & Light* v. *FPC*, *supra* note 21, 156 U.S.App.D.C. at 317, 481 F.2d at 492; *Associated Press* v. *FCC*, 145 U.S.App.D.C. 172, 180, 448 F.2d 1095, 1103 (1971).

LUMBARD, *Circuit Judge* (concurring):* I concur in affirming the orders and add this brief summary of the reasons therefor.

There is no dispute, as indeed there could not be, that the doctrine first enunciated in *Sierra Pacific* and *Mobile* precludes a public utility, such as appellants herein, from unilaterally increasing its rates in abrogation of the terms of a fixed rate contract. Rather, it is in recognition of this principle that Appalachian argues that we should disregard the explicit language in its wholesale agreements establishing a fixed rate for the purchase of electric power and instead accept its contention that the true but unexpressed intention of it and its customers was to adopt a "going rate" agreement, see *United Gas Pipe Line Company* v. *Memphis Light, Gas & Water Division*, 358 U.S. 103 (1958), in conformity with Virginia's alleged proscription of "fixed and unalterable rate contracts."[1] The court correctly declines this invitation to step outside the corners of an unambiguous contract. The parol evidence rule, as consistently applied in both the Virginia state courts[2] and this Circuit,[3] forbids such an excursion.

Kentucky Utilities' (KU) petition for review presents a more troublesome question. In assessing the impact of the Natural Gas Act upon pre-existing contract rights, the Supreme Court in *Mobile* concluded that "the rate-making powers of natural gas companies [are] to be no different

---

* Sitting by designation.

[1] Appalachian Power Co., 48 F.P.C. 1366, 1367 (1972) (original order).

[2] *E.g.*, Globe Iron Const. Co. v. First National Bank, 205 Va. 841, 140 S.E.2d 629, 633 (1965).

[3] *E.g.*, E. P. Hinkel & Co. v. Manhattan Co., 506 F.2d 201, 204 (D.C. Cir. 1974).

from those they would possess in the absence of the Act,"[4] 350 U.S. at 343. KU would read this passage as endorsing its proposed unilateral rate increase since, it maintains, under Kentucky law, to which it was subject prior to the assertion of federal regulatory jurisdiction, it was allowed to and did institute unilateral rate changes. Although reasonable at first blush, KU's argument does not withstand closer inspection.[5]

The above quoted passage from the *Mobile* opinion must be read in the context of the Supreme Court's assumption that "[a]bsent the Act, a unilateral announcement of a change to a contract would of course be a nullity," 350 U.S. at 339. Assuming, *arguendo*, that such is not the case under Kentucky law, I do not believe that there is any warrant in either *Sierra Pacific-Mobile* or elsewhere, for requiring the F.P.C. to defer to state law when such a deferral would impair the Congressional purpose of insuring "the stability of supply arrangements which all agree is essential to the health of the natural gas [and power] industries," *Mobile*, 350 U.S. at 344. *Cf. Jerome* v. *United States*, 318 U.S. 101, 104 (1945).

---

[4] As the Supreme Court recognized in Sierra Pacific: "The provisions of the Federal Power Act relevant to this question are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act," 350 U.S. at 353.

[5] KU also argues that despite the clear language in its wholesale agreements establishing a fixed rate, the intent of the parties was to permit unilateral changes as sanctioned by Kentucky law. For the reasons given above in connection with Appalachian's similar claim, this contention is unsound.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

ELECTRIC RATES; REJECTION OF FILING; SUSPENSION; HEARING; PROCEDURES; INTERVENTIONS

Before Commissioners: John N. Nassikas, Chairman; Albert B. Brooke, Jr., and Rush Moody, Jr.

Docket No. E-8172

KENTUCKY UTILITIES COMPANY

Order Rejecting in Part Proposed Increase in Rates, Accepting for Filing in Part and Suspending Proposed Increases in Rates, Providing for Hearing, Establishing Procedures and Permitting Interventions.

(Issued June 29, 1973)

On May 1, 1973, Kentucky Utilities Company filed in Docket No. E-8172 a proposed increased rate, designated WPS-73, applicable to service provided by Kentucky to eleven all-requirements municipal customers in Kentucky [1] and to its wholly-owned subsidiary Old Dominion Power Company.[2] In addition Kentucky submitted as a part of its filing a proposed increase in rates for service to its partial requirements customer, the City of Paris.[3] The proposed increases in rates amount in total to approximately $733,000 annually, based on a 12-month test period ended July 31, 1972. Kentucky states that the purpose of its filing is to bring the company's wholesale rates to a level more nearly reflecting increases in costs which it has experienced in recent years. Kentucky requested the proposed increase be permitted to become effective on July 1, 1973.

[1] The Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Nicholasville, and Providence; and Berea College serving the City of Berea at retail.

[2] Supplement No. 4 to Kentucky's FPC Rate Schedule No. 78 (Supersedes Supplement No. 2).

[3] Supplement No. 1 to Kentucky's FPC Rate Schedule No. 83.

Notice of Kentucky's filing was issued on May 30, 1973, providing for comments thereon to be filed on or before June 15, 1973. In response to the notice the eleven municipal wholesale customers filed, on June 14, 1973, a motion to reject the filing and a petition to intervene. On June 15, 1973, a similar request for rejection and petition to intervene was filed by the City of Paris. The above customers allege that their contracts with Kentucky are fixed-rate contracts, and that unilateral increases in rates thereunder, as proposed by Kentucky, are proscribed by the rule of law established in the *Mobile* and *Sierra* cases.[4]

A review of the contracts between Kentucky and the municipal all-requirements customers reveals that they are in fact fixed-rate contracts without any provision for unilateral changes in the specified rates during the term of the contracts. Under the *Mobile-Sierra* doctrine, a utility may not increase its contractually established rates by means of unilateral rate increase applications under Section 205 of the Federal Power Act or Section 4 of the Natural Gas Act. Under these circumstances, and in the absence of the concurrence of the customers, this Commission is without authority to entertain Kentucky's rate increase application as to the all-requirements municipal customers and accordingly it must be rejected.

Paris also argues that its contract with Kentucky likewise prohibits unilateral rate filings. We cannot agree. Paris relies on Section 8.01 of the subject contract, which provides, in pertinent part, as follows:

> 8.01 Each party shall designate an Operating Representative and an alternate who shall be fully authorized to:
>
> * * *

[4] *United Gas Pipe Line Co.* v. *Mobile Gas Service Co.*, 350 U.S. (1956); *F.P.C.* v. *Sierra Pacific Power Company*, 350 U.S. 348 (1956).

(C) To cooperate and arrange for the interchange of power and energy, and to agree upon the charges for such power and energy or other items of value furnished incident thereto by one party to the other.

Paris takes the position that under the above provision no rate increase is permitted except as agreed to by it, and that not having agreed to the proposed increase by Kentucky, that increase must be rejected. The contract, however, also provides, in Section 7.06, that:

> "In the event there should be substantial changes in the economic conditions which would substantially affect the cost of providing generating capacity or the cost of production of electric energy, it is the intention of the parties hereto that a revision in rates should be considered and effected."

We find this latter provision to be controlling. The rates in question are subject to the exclusive jurisdiction of this Commission, and even if Kentucky and Paris were to agree upon a new rate, such new rate would be subject to FPC approval. Where no such agreement is reached, the just and reasonable rate must be established by this Commission in order to give meaning to the express terms of the contract. Accordingly, the proposed increase in rates for service to Paris will be accepted for filing. Since the proposed rates for both Paris and Old Dominion may be excessive, such rates will be suspended, set for hearing, and permitted to become effective after suspension subject to refund.

The petitions to intervene appear reasonable and will be granted.

The Commission orders:

(A) Pursuant to the authority of the Federal Power Act, particularly Sections 205, 206, 301, 308, and 309 thereof, and the Commission's Rules and Regulations, a public hearing shall be held concerning the lawfulness of Kentucky's proposed increase in rates for jurisdictional service to the

City of Paris and Old Dominion Power Company, commencing with a prehearing conference to be held on November 9, 1973.

(B) Pending such hearing and decision thereon, Kentucky's proposed increase in its rates to Paris and Old Dominion are hereby accepted for filing, suspended for a period of two months, and the effectiveness thereof deferred until September 1, 1973.

(C) The proposed increase in rates to Kentucky's above-mentioned all-requirements municipal customers is rejected.

(D) At the prehearing conference on November 9, 1973, the direct evidence of the company and the staff shall be admitted into the record, and procedures adopted for an orderly and expeditious hearing.

(E) On or before November 2, 1973, the Commission's staff shall serve its prepared testimony and exhibits, if any. The prepared testimony and exhibits of other parties, if any, shall be served on or before November 23, 1973. Any rebuttal evidence by Kentucky shall be served on or before December 14, 1973. Cross-examination of the evidence filed shall commence at 10:00 A.M., EST on December 17, 1973, in a hearing room of the Federal Power Commission.

(F) A Presiding Administrative Law Judge to be designated by the Chief Administrative Law Judge for that purpose shall preside at the hearing initiated by this order, and shall conduct such hearing in accordance with the Federal Power Act, the Commission's Rules and Regulations, and the terms of this order.

(G) The above-named petitioners are hereby permitted to intervene in this proceeding, subject to the Rules and Regulations of the Commission: *Provided, however,* that the participation of such intervenors shall be limited to matters

affecting the rights and interests specifically set forth in their petitions to intervene; and *Provided, further,* that the admission of such intervenors shall not be construed as recognition that they or any of them might be aggrieved because of any order issued by the Commission in this proceeding.

(H) Nothing contained in this order shall relieve the applicant of any responsibility imposed by the Economic Stabilization Act of 1970, (Public Law 91-379, 84 Stat. 799, as amended by Public Law 92-15, 85 Stat. 38), or by any Executive Order or rules and regulations promulgated pursuant to such Act.

(I) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(Seal)

KENNETH F. PLUMB
Secretary.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman; Rush Moody, Jr., and William L. Springer.

Docket No. E-8172

KENTUCKY UTILITIES COMPANY

Order Denying in Part and Granting Motion for Rehearing and Instituting an Investigation Under Section 206.

(Issued August 22, 1973)

On May 1, 1972, Kentucky Utilities Company (KU) filed in Docket No. E-8172 a proposed rate increase, designated WPS-73, applicable to service provided by KU to eleven all-requirements municipal customers in Kentucky [1] and to its wholly-owned subsidiary Old Dominion Power Company. The proposed increases in rates amount in total to approximately $733,000 annually, based on a 12-month test period ended July 31, 1972. The proposed effective date of WPS-73 rate schedules is August 1, 1973. KU states that the purpose of its filing is to bring the company's wholesale rates to a level more nearly reflecting increases in costs which it has experienced in recent years. Notice of KU's filing was issued on May 30, 1973, providing for comments thereon to be filed on or before June 15, 1973.

In an order issued June 29, 1973, the Commission rejected KU's filing with respect to the eleven municipal customers on the basis that the contracts were in fact fixed-rate contracts without any provision for unilateral changes in the specified rates during the term under the contract. There-

---

[1] The Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Nicholasville and Providence, and Berea College serving the City of Berea at retail.

fore, we stated that under the *Mobile-Sierra* doctrine,[2] KU may not increase its established rates without concurrence of the customers.

On July 23, 1973, KU filed with the Commission a Motion For Rehearing of the Order of June 29, 1973, with respect to the rejection of the filing as to the eleven municipal customers. KU states that under a recent decision of the United States Court of Appeals for the District of Columbia Circuit issued May 25, 1973 in *Richmond Power and Light of the City of Richmond, Indiana* v. *FPC* (D.C.C.A. Nos. 72-1963, 72-2035) the contracts are to be interpreted in accordance with Kentucky state law. Since Kentucky law permits unilateral filings, KU asserts the Commission must vacate its order of June 29, 1973 which rejected KU's filing because the contracts in question here were "fixed-rate" contracts.

We disagree for several reasons. Firstly, the *Richmond* case involved a contract which was entered into when it was contemplated that the Federal Power Commission might attain jurisdiction over the agreement. The court in *Richmond* stated that Indiana law must apply in executing the agreement because the parties specifically stated that the energy charge would be "at the rate and under the provisions of Company's (I & M) Tariff I.P. as regularly filed with the Public Service Commission of Indiana . . . ." There is no such language in the present agreement between KU and the municipal customers. Each agreement provides:

> "Each month the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to customer during the preceding month or bi-month determined in accordance with Rate

[2] *United Gas Pipeline Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Company*, 350 U.S. 348 (1956).

> Schedule WPS-3R, which is made part of this contract. The minimum bill will be as provided in the rate schedule"[3]

None of the municipal contracts refer to the rate on file with the Kentucky Commission. The parties specifically state that the rates are to be determined with reference to either Rate Schedules WPS-5 or WPS-3R. There is no indication of intent that the Kentucky law should apply and therefore the *Richmond* case is not controlling.

Likewise, *Anderson Power and Light of the City of Anderson, Indiana* v. *FPC* (— F.2d —CCADC No. 72-7035) is not controlling. In *Anderson*, the court made reference to contracts that were on file only with the state commission, whereas in this case the relevant contracts are on file with this Commission. Moreover, in *Anderson*, the court ruled that since the contract was entered into in 1957, the parties intended that Indiana law should apply and therefore an unilateral filing would not be allowed. The present contracts were entered into in 1963, 1965, 1969 or 1970 (see Appendix A). KU began filing on September 7, 1962, at the Commission's request. While the Commission's attempt to assert jurisdiction over the agreements was not finally affirmed until 1965, KU and the parties must have assumed the Commission might have jurisdiction since they filed the agreements with the Commission and with the Kentucky Commission. Therefore, *Anderson* is not controlling and the instant agreements are subject to the Commission's Rules and Regulations Under the Federal Power Act.

A second reason for rejecting KU's contention that the present agreements are 'going-rate" contracts is the con-

[3] The contracts of some of the Customers entered into prior to September, 1965, make reference to rate schedule WPS-5 rather than WPS-3R. These contracts were amended by agreement of both parties to the contracts in September, 1965, to substitute rate WPS-3R for WPS-5 in those contracts. These contracts are on file with the Federal Power Commission.

duct of KU itself. On August 1, 1965, KU made a unilateral filing with the Federal Power Commission and the Kentucky Commission substituting Rate Schedule WPS-5 for WPS-3R. The Federal Power Commission informed KU that its filing would not be accepted without customer approval. KU withdrew the filing and submitted a new one with customers' concurrence which was accepted on October 22, 1965. In 1969, KU proposed changes in its fuel adjustment clause. The Commission informed KU that it could not make such a change by a unilateral filing because of the "fixed-rate" contract. Again, KU acquired customers' approval and the filing was accepted. Both these filings by KU and its subsequent action in accordance with Commission's directives shows a clear intent on the part of KU to treat the agreements as fixed rate contracts.

We also note in its filing of May 1, 1973, KU has requested a Rate Adjustment Provision. This clause purports to give KU the authority to act in a manner which it argues, in its Application For Rehearing, that it already has. That is, the clause provides KU with the right to make unilateral filings. However, KU asserts that it also has this power under Kentucky law and due to the *Richmond* decision, the Federal Power Commission must follow Kentucky law. Assuming, *arguendo,* KU's position that the *Richmond* case is controlling, the request for such a clause would hardly be necessary.

A final argument by KU is that if the agreements are interpreted as "fixed-rate" contracts, they can be so interpreted only to the capacity specified in the existing contracts.

Although we continue to reject KU's filing as to the Municipal Customers under Section 205, we shall institute an investigation under Section 206 of the Federal Power Act to determine if the rates contained in the fixed rate

contracts are in the public interest. With regard to deliveries in excess of the maximum contractual commitments of KU under these fixed rate contracts, we agree with KU and shall accept the new rates applied for herein as an initial filing with an effective date of August 1, 1973, the requested effective date, and institute an investigation under Section 206 to determine whether such rates are in the public interest. The filing requirements of Section 35.3(a) of the Regulations of the Federal Power Act will be hereinafter waived. The Section 206 proceedings will be held in conjunction with the hearing previously ordered in this docket in the order of June 29, 1973. The dates for service of evidence in the Section 206 investigation shall be the same as set forth in our order of June 29, 1973.

The Commission finds:

(1) KU's filing with respect to deliveries in excess of the maximum contractual commitment under the fixed rate contracts are treated as an initial filing and should be accepted effective August 1, 1973, and an investigation under Section 206 should be ordered to determine the justness and reasonableness of the rates charged therein.

(2) The filing requirements of Section 35.3(a) of the Regulations under the Federal Power Act are waived.

(3) With respect to the fixed rate contracts, an investigation under Section 206 should be ordered to determine the justness and reasonableness of the rates under those contracts.

(4) KU's application for rehearing with respect to the Commission's rejection of KU's Section 205 filing presents no new facts or principles which were not considered in our order of June 29, 1973, or which having been considered, warrant any change or modification of that order.

The Commission orders:

(A) KU's filing with respect to deliveries in excess of the maximum contractual commitment under the fixed rate contracts are treated as an initial filing and are accepted effective August 1, 1973, and an investigation under Section 206 is ordered to determine the justness and reasonableness of the rates charged therein to be held in conjunction with the hearings and according to the procedures established in our June 29, 1973, order in this docket.

(B) With respect to the fixed rate contracts, an investigation under Section 206 is ordered to determine the justness and reasonableness of the rates under those contracts to be held in conjunction with the hearings and according to the procedures established in our June 29, 1973, order in this docket.

(C) KU's application for rehearing of the Commission's order of June 29, 1973, is hereby denied with respect to its Section 205 filing, and is granted with respect to deliveries in excess of the maximum contractual commitment.

By the Commission.

KENNETH F. PLUMB,
Secretary.

APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John Nassikas, Chairman; Rush Moody, Jr., and William L. Springer.

Docket No. E-8172

KENTUCKY UTILITIES COMPANY

Order Granting Application for Rehearing and Instituting a Section 206 Investigation.

(Issued October 18, 1973)

On August 22, 1973, this Commission issued an order in Docket No. E-8172 which denied-in-part and granted-in-part Kentucky Utilities (KU) motion for rehearing filed July 23, 1973. Specifically, the Commission ordered that KU's filing as to deliveries in excess of the maximum contractual commitment under the fixed rate contracts were to be treated as an initial filing and should be accepted effective August 1, 1973, and an investigation under Section 206 of the Federal Power Act be instituted to determine the justness and reasonableness of the rates. With respect to the fixed rate contracts, the Commission ordered a Section 206 investigation to determine whether KU's rates were so low as to not be in the public interest.

On September 18, 1973, an application for rehearing of our August 22, 1973, order was filed by eleven municipal wholesale customers (Petitioners).[1] In its petition, Petitioners allege that since the inception of the contracts under review, KU has been delivering to Petitioners a total kilowatt demand considerably in excess of the contractual commitment stated in the contracts. Petitioners contend

[1] The Cities of Barbourville, Bardstown, Bardwell, Benham, Corbin, Falmouth, Frankfort, Madisonville, Nicholasville, and Providence, and Berea College serving the City of Berea at retail.

that such past practice and language of the contracts requires that, as to these excess amounts, the proposed rates should not be treated as initial rates but rather as rate changes.

After review of the contracts and the language contained therein, we agree with Petitioners' position. Whether or not KU has in fact been supplying amounts of electric energy in excess of the maximum contract demand in the Company's contracts does not in any way alter the fact that only the Company's contracts, as filed with the Commission, along with any properly filed and accepted amendments, can be regarded as embodying the presently effective contractual rates, terms and conditions.

Each contract in question contains the following clause:

> "The Customer may from time to time cause to be increased the amount of energy to be delivered stating the amount of additional energy desired, such request to be made at least 90 days prior to the time such additional energy is required by the Customer."

This language clearly shows that the Company has agreed to furnish to its customers, upon reasonable notice, their total electric service requirement without having to amend the contracts. Therefore, the amounts we consider to be in excess of the contract demand (and therefore outside the parameters of the fixed rate contract) were in fact covered by the provisions of the contract. Such a construction is compelled by the above-quoted language which clearly contemplates increases in contract demand.

Accordingly, we shall grant the Petitioners' application for rehearing of our order of August 22, 1973, and reject the rates proposed by KU in this docket as such rates would apply to the Petitioners. We shall set for investigation, under Section 206 of the Federal Power Act, the rates currently being charged under these contracts in order to

determine whether the rates contained therein are in the public interest.

In our order of August 22, 1973, this Commission treated the rates, as applicable to the amounts of deliveries above in each contract, as initial rates and made these rates effective August 1, 1973. Since the proposed increased rates are contractually barred under *Mobile Sierra*,[2] KU shall be required to refund all excess amounts collected since August 1, 1973.

The Commission finds:

(1) Good cause exists to grant petitioners' application for rehearing.

(2) KU's proposed increased rates with respect to the contracts of the eleven municipal wholesale should be rejected under the *Mobile-Sierra* doctrine.

(3) An investigation under Section 206 of the Federal Power Act should be instituted to determine whether KU's rates with respect to Petitioners' total electric service requirements are in the public interest.

(4) Refunds should be ordered with respect to amounts collected in excess of the rates chargable under the contracts since August 1, 1973.

The Commission orders:

(A) Petitioners' application for rehearing of September 18, 1973, is hereby granted.

(B) KU's proposed rates are hereby rejected under the *Mobile-Sierra* doctrine.

---

[2] *United Gas Pipeline Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 322 (1956).

F.P.C. v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

(C) An investigation under Section 206 of the Federal Power Act is hereby instituted, in accordance with the procedural dates set forth in our order of July 29, 1973, to determine whether KU's rates with respect to Petitioner's total service requirements are in the public interest.

(D) KU shall make refunds of all amounts collected in excess of the rates chargable under these contracts since August 1, 1973.

(E) The Secretary shall cause prompt publication of this order in the Federal Register.

By the Commission.

(Seal)

KENNETH F. PLUMB,
Secretary.

APPENDIX E

Sections 205, 206(a), 308(b) and 313(b) of the Federal Power Act.

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d(a)]

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service. [49 Stat. 851; 16 U.S.C. 824d(b)]

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services. [49 Stat. 851; 16 U.S.C. 824d(c)]

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping

open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published. [49 Stat. 851-852; 16 U.S.C. 824d(d)]

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require

such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [49 Stat. 852; 16 U.S.C. 824d(e)]

* * *

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e(a)]

* * *

SEC. 308 (b) All hearings, investigations, and proceedings under this Act shall be governed by rules of practice and procedure to be adopted by the Commission, and in the conduct thereof the technical rules of evidence need not be applied. No informality in any hearing, investigation, or proceeding or in the manner of taking testimony shall invalidate any order, decision, rule, or regulation issued under the authority of this Act. [49 Stat. 858; 16 U.S.C. 825g(b)]

* * *

SEC. 313 (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such

proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States [6] for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.[7] Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside order in whole or in part.[5] No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were unreasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The

judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).[8] [49 Stat. 860-861; 16 U.S.C. 825l(b)]

APPENDIX F

Sections 278.160, 278.180 and 278.190 of the Kentucky Revised Statutes.

278.160 *Utilities to file and display schedules of rates, adherence to schedule.* (1) Under rules prescribed by the commission, each utility shall file with the commission, within such time and in such form as the commission designates, schedules showing all rates established by it and collected or enforced. The utility shall keep copies of its schedules open to public inspection under such rules as the commission prescribes.

(2) No utility shall charge, demand, collect or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules, and no person shall receive any service from any utility for a compensation greater or less than that prescribed in such schedules.

* * *

278.180 [3952-15] *Changes in rates, how made* (1) Except as provided in subsection (2) of this section, no change shall be made in any rate except upon twenty days' notice to the commission, stating plainly the changes proposed to be made and the time when the changed rates will go into effect.

(2) The commission, upon application of any utility, may prescribe a less time within which a reduction of rates may be made.

• • •

278.190 [3952-16] *Procedure when new schedule of rates filed; suspension of new rate schedule; burden of proof; refunds.* (1) Whenever any utility files with the commission any schedule stating new rates the commission may, upon its own motion, or upon complaint as provided in KRS 278.250, and upon reasonable notice, enter upon a hearing concerning the reasonableness of the new rates.

(2) Pending such hearing and the decision thereon and after notice to the utility, the commission may, at any time before said schedule becomes effective, suspend the operation of said schedule and defer the use of such rate, charge, classification or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after such hearing, either completed before or after the rate, charge, classification or service goes into effect, the commission may make such orders with reference thereto as it deems proper in the matter. If the proceeding has not been concluded and an order made at the expiration of such five months the utility may place the proposed change of rate, charge, classification or service in effect at the end of such period after notifying the commission, in writing, of its intention so to do . . . .

APPENDIX G

Some Recent Federal Power Commission Decisions Applying the Mobile-Sierra-Memphis Doctrine

(June 1973 - March 1976)

June-Dec. 1973

Appalachian Power Company, 48 F.P.C. 1366 (1972); 49 F.P.C. 387 (1973) (rehearing denied), *aff'd, Appalachian Power Co.* v. *FPC*, No. 73-1290, D.C. Circuit, January 18, 1976.

Kentucky Utilities Company, 49 F.P.C. 1470 (1973); 50 F.P.C. 537, 1120 (1973) (rehearing denied), *aff'd, Kentucky Utilities* v. *FPC*, No. 73-2085, D.C. Circuit, January 18, 1976.

Gulf States Utilities Company, Docket No. E-8121, issued June 14 1973 (rehearing denied October 19, 1973), *aff'd, Gulf States Utilities* v. *FPC*, 518 F.2d 450 (D.C. Circuit 1975).

Gulf States Utilities Company, Docket No. E-8121, issued June 14, 1973 (rehearing denied August 7, 1973), *rev'd, sub nom. Sam Rayburn Dam Electric Cooperative* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975).

Southern California Edison Company, Docket No. E-8176, issued July 6, 1973; modified by orders of August 29, 1973 and January 3, 1974.

Mississippi Power Company, Docket No. E-7625, issued September 27, 1973 (rehearing denied November 23, 1973).

1974

Wisconsin Electric Power Company; Wisconsin-Michigan Power Company, Docket No. E-8619, issued April 19, 1974.

Minnesota Power and Light Company, Docket No. E-8494, issued April 29, 1974 (reconsideration denied Sep-

tember 3, 1974) *aff'd*, No. 74-1796, D.C. Circuit, January 18, 1976 (unpublished judgment)).

Public Service Company of Indiana, Docket No. E-8587, issued May 7, 1974 (rehearing denied May 30, 1974).

Indiana and Michigan Electric Company, Docket No. 7740, issued June 3, 1974 (rehearing denied August 2, 1974), *aff'd, Indiana & Michigan Electric Company* v. *FPC*, No. 74-1844, February 12, 1976, D.C. Cir. (per curiam).

Iowa Public Service Company, Docket No. E-8815, issued June 28, 1974; modified August 9, 1974.

Central Kansas Power Company, Docket No. E-8755, issued July 2, 1974 (reconsideration denied October 16, 1974).

Western Massachusetts Electric Company, Docket No. E-8798, issued July 19, 1974 (rehearing denied August 30, 1974).

Potomac Edison Company, Docket No. E-8878, issued July 31, 1974.

Holyoke Water Power Company; Holyoke Power and Electric Company, Docket No. E-8843, issued August 9, 1974 (rehearing denied in part and granted in part October 9, 1974) (appeal docketed, No. 74-1796, D.C. Circuit).

Sierra Pacific Power Company, Docket Nos. E-7706, E-7750 and E-8092, issued August 15, 1974 (rehearing denied August 18, 1975).

Wisconsin Public Service Corporation, Docket No. E-8867, issued August 23, 1974 and December 9, 1975.

Arkansas-Missouri Power Company, Docket No. E-9092, issued November 29, 1974; modified January 23, 1975.

Montaup Electric Company, Docket No. E-9117, issued December 18, 1974.

1975

Wisconsin Power and Light Company, Docket No. E-9198, issued February 19, 1975 (rehearing denied April 18, 1975).

Missouri Utilities Company, Docket No. E-9422, issued May 5, 1975 (rehearing denied July 30, 1975).

Detroit Edison Company, Docket No. E-9294, issued July 2, 1975 (rehearing granted for purposes of receiving responses and for further consideration August 20, 1975).

Central Maine Power Company, Docket Nos. E-7824 and E-8038, issued July 3, 1975 (rehearing denied August 29, 1975) (appeal docketed, *sub nom. New England Power Company* v. *FPC*, No. 75-1945, D.C. Circuit).

Public Service Company of New Mexico, Docket No. E-9454, issued July 31, 1975 (rehearing denied September 26, 1975) (appeal docketed, No. 75-1692, 10th Circuit; consolidated with City of Gallup, N.M. No. 76-1013).

Public Service Company of Colorado, Docket No. E-8882, issued November 17, 1975.

Public Service Company of Indiana, Inc., Docket Nos. ER 76-149 and E-9537, issued November 28, 1975.

Kansas Power and Light Company, Docket No. ER 76-36, issued December 22, 1975 (rehearing denied February 18, 1976).

Iowa Electric Light and Power Company, Docket No. ER 76-206, issued December 31, 1975 (rehearing denied February 2, 1976 and March 24, 1976).

Jan.-March 1976

Western Power Division, Central Telephone and Utilities Corporation, Docket No. ER 76-92, issued February 20, 1976.

Illinois Power Company, Docket No. E-9520, issued March 8, 1976.

Supreme Court, U. S.
FILED
MAY 6 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION;
ELECTRIC AND WATER PLANT BOARD OF THE
CITY OF FRANKFORT, KENTUCKY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY, ET AL., IN OPPOSITION

SANDRA J. STREBEL
Attorney for the Electric and Water Plant Board of the City of Frankfort, Kentucky, et al.

SPIEGEL & MCDIARMID
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

May 6, 1976

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTE INVOLVED	3
COUNTERSTATEMENT OF THE CASE	3
ARGUMENT	8
I. The Questions KU Seeks to Have the Court Consider Are Irrelevant to This Case	8
II. The Petition for a Writ of Certiorari Raises No Issue Worthy of the Court's Consideration	9
III. There Is No Inconsistency With Prior Decisions of the Court of Appeals for the District of Columbia Circuit	11
IV. There Is No Conflict Among the Circuits	13
V. KU's Complaint With Respect to Section 206 Relief Is Not Properly Raised	13
CONCLUSION	15

TABLE OF CITATIONS

CASES: Page

Anti-Defamation League of B'nai B'rith v. *F.C.C.*, 403 F.2d 169 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969) 11
Appalachian Power Co. v. *FPC*, 529 F.2d 342 (D.C. Cir. January 8, 1976) 1
Canal Barge Co. v. *Griffith*, 480 F.2d 11 (5th Cir. 1973), *modified*, 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 44 U.S. L.W. 3202 (Oct. 7, 1975) 12
FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ..... 2, *passim*
Mid-South Electric Coop v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975) 11
Richmond Power & Light v. *FPC*, 481 F.2d 490 (D.C. Cir. 1973), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *FPC*, 414 U.S. 1068 (1973) 10, 12
Sam Rayburn Dam Electric Cooperative v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975) 11
Shell Oil Co. v. *FPC*, 334 F.2d 1002 (3rd Cir. 1964) 13
United Gas Pipe Line Co. v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958) ..... 2, *passim*
United Gas Pipe Line Co. v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ..... 2, *passim*

STATUTES:

Federal Power Act:

§ 205(d), 16 USC 824d(d) 3
§ 206, 16 USC 824e 7, 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY,
Petitioner

v.

FEDERAL POWER COMMISSION;
ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR THE ELECTRIC AND WATER PLANT BOARD OF THE CITY OF FRANKFORT, KENTUCKY, ET AL.,[1] IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1a-21a) is reported *sub nom. Appalachian Power Co.* v.

[1] This brief is filed on behalf of the Electric and Water Plant Board of the City of Frankfort, Kentucky; the City Utilities Com-

FPC, 529 F.2d 342 (D.C. Cir. January 8, 1976). The initial order of the Federal Power Commission dated June 29, 1973 (Pet. App. B 22a-26a), its order of August 22, 1973, modifying its initial order (Pet. App. C 27a-32a) and its order of October 18, 1973, denying rehearing (Pet. App. D 33a-36a) are reported at 49 FPC 1470, 50 FPC 537 and 50 FPC 1120, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on January 8, 1976. The petition for a writ of certiorari was filed on April 7, 1976.

QUESTION PRESENTED

Whether the Federal Power Commission and the court of appeals properly determined on the basis of uncontested facts that the rate filing of Kentucky Utilities Company was inconsistent with contractual commitments and therefore improper under the authority of the *Mobile-Sierra-Memphis* [2] line of cases.

---

mission of Barbourville, Kentucky; the City of Bardstown, Kentucky; Bardwell City Utilities, Bardwell, Kentucky; the Electric Plant Board of Benham, Kentucky; Berea College (providing retail electric service to the City of Berea, Kentucky); the City Utilities Commission of Corbin, Kentucky; the City of Falmouth, Kentucky; the City of Madisonville, Kentucky; the City of Nicholasville, Kentucky; and the Municipal Light and Water Plant of Providence, Kentucky. For convenience these parties are hereinafter collectively referred to as "Cities".

[2] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103 (1958). For convenience, these cases are hereinafter referred to as *"Mobile"*, *"Sierra"*, and *"Memphis"*, respectively, or *"Mobile-Sierra-Memphis"*, collectively.

STATUTE INVOLVED

The pertinent portions of the Federal Power Act are set forth in the petition for a writ of certiorari (Pet. App. E 37a-41a).

COUNTERSTATEMENT OF THE CASE

This case concerns an unsuccessful attempt by Kentucky Utilities Company (hereinafter referred to as "KU") to increase unilaterally by a filing with the Federal Power Commission (hereinafter referred to as "FPC" or "Commission") pursuant to Section 205(d) of the Federal Power Act,[3] rates established by contracts with eleven of its wholesale for resale customers. The Commission rejected the tendered rate filing, finding that the contracts under which KU serves those customers are fixed-rate contracts which do not permit unilateral rate changes. The Court of Appeals for the District of Columbia Circuit affirmed.

Cities are municipally owned and operated electric utilities, with the exception of Berea College, an educational institution which provides retail electric service in the City of Berea, Kentucky. Cities all purchase their total requirements of electric power and energy at wholesale from KU for resale to their customers at retail, under negotiated contracts which provide in pertinent part:

> "Each month, the Customer will pay to the Company at its office, within 10 days of rendition of bills, for all energy delivered to the Customer during the preceding month or bi-month determined in accordance with rate schedule number WPS-3R, which is made a part of this contract." [4] (e.g. R. 233)

---

[3] 16 U.S.C. 824d(d).

[4] The contracts as entered into in 1963 made reference to rate schedule number "WPS-5" rather than "WPS-3R". These contracts

There is no reference to changes in rate, nor mention of any procedure for changing the rate, in the contracts, in the rate schedule, or in the rules and regulations or terms and conditions which are made part of the contracts.

The contracts in issue here were entered into by KU and its wholesale customers commencing in July of 1963, ten months after KU had first filed its wholesale rate schedules with the FPC (R. 341). The most recent was entered into in 1973 (R. 339). The rate contained in the 1963 contracts was one designated "WPS-5".

On August 1, 1965, KU filed with the FPC a rate reduction to Cities, reflected in a new WPS-3 rate. (R. 355-356). On September 10, 1965, the Acting Chief of the Commission's Bureau of Power wrote to KU as follows (R. 557):

> "This will confirm the telephone conversation between Mr. W. H. Skinner of your company and Mr. A. J. Garber of the Commission's staff on September 8, 1965 regarding the proposal contained in your letter of August 20, 1965. The following points were agreed upon:
>
> * * * *
>
> 2. The filing will contain evidence of acceptance of the revised rate by the customers. Such acceptance may be indicated on the company's letters to the customers transmitting the revised rate."

The revised rate referred to in this letter was designated by KU as "WPS-3R". On the same day, September 10, 1965, KU wrote to each of the Cities then under WPS-5 contracts as follows (R. 535):

> "If this change in rate to WPS-3R, for electric service covered under your existing contract with Kentucky Utilities Company, is acceptable, please so indicate its acceptance on the part of your utility system by signing both copies of this letter (which is sent in duplicate) and return the duplicate copy to us. The other copy of letter and copy of Electric Rate Schedule WPS-3R may be attached to and made a part of your existing contract and substituted for the rate schedule called for in that contract."

---

were amended by written agreement of both parties in September, 1965, to substitute rate schedule "WPS-3R" for "WPS-5" in those contracts. (R. 238)

At the bottom of those letters, immediately above the space provided for the signature of the wholesale customer was the following statement:

> "Electric Rate Schedule WPS-3R, attached hereto, is accepted as a part of existing contract with Kentucky Utilities Company in place of rate schedule designated therein." (R. 535).

Cities executed the agreements and on October 4, 1965, they were filed with the FPC. (R. 238).

On February 28, 1969, KU submitted to the FPC for filing a unilateral change in the fuel cost adjustment component of its rate to Cities, effecting a rate reduction to Cities. KU's submittal was rejected by the Commission as not permitted under KU's fixed-rate contracts with Cities. The Secretary of the Commission informed KU as follows (R. 559):

> "A review of the agreements that would be affected by the subject filing indicates that they do not contain provisions which would permit a unilateral change to be made therein. It is therefore requested that you provide each of the affected parties with appropriate notification of your intention to revise your company's fuel clause adjustment factor and obtain their agreement with respect thereto. After such agreement has been obtained, you should submit two copies of the proposed revised fuel clause together with an indication of the

customer's acceptance for each of the rate schedules affected by your submittals.

"In view of the foregoing, your submittals tendered with your letter of February 28, 1969 are not being considered as rate schedule filings and are being retained in the Commission's files for information purposes only."

Following receipt of the Secretary's letter, KU wrote to each of the WPS-3R customers on April 2, 1969, informing them of the proposed reduction in the fuel adjustment factor and concluding as follows (R. 516):

"In order that this reduction may be placed in effect with respect to your contract we have, as requested in the Federal Power Commission letter . . . provided space for your signature of acceptance."

Ten of the Cities signed the acceptance letter, but Frankfort did not. By letter of April 21, 1969, KU urged Frankfort to sign the acceptance in order to gain the benefit of the lower fuel adjustment factor. KU concluded as follows (R. 560):

"Inasmuch as the Federal Power Commission is requiring acceptance on the part of the Plant Board, and we must notify them by copy of such acceptance, we will have no alternative to billing the higher fuel adjustment factor."

The ten Cities which signed the acceptance have been billed the lower fuel adjustment factor since 1969. Frankfort, which did not give its written agreement to this change in the contract rate, has been and continues to be billed at the higher fuel adjustment factor. (R. 516).

No other changes were made or attempted to be made by KU in its contract rates to Cities until May 1, 1973, when KU unilaterally submitted to the Commission a filing which would increase its rates to Cities. (R. 433 et seq.). On motion of the Cities, the Commission re-

jected the rate filing insofar as it related to the Cities because of the inconsistency of the higher rates with KU's contractual commitment to the Cities. (Pet. App. B 23a).

On application for rehearing dated July 23, 1973, KU set forth the undisputed history of its rate schedules from the time prior to 1940 when it began to serve the Cities through the time it first filed wholesale rate schedules with the FPC in 1962 and through the filing of the rate schedule now in issue. (R. 653-671). The Commission, however, noted that all of the contracts currently in force were executed after the Company began filing its schedules with the FPC, and determined that Kentucky law and practice during periods prior to 1962 had no relevance to contracts executed in 1963 and thereafter. (Pet. App. 29a). The Commission also noted that in 1965 and 1969 KU secured the consent of its customers before seeking rate adjustments.[5]

Upon review, the Court of Appeals for the District of Columbia Circuit considered KU's arguments that a hearing was required on the applicability of state law and prior practice before the state regulatory commission. In the opinion for the court, Judge Robinson rejected these contentions, stating:

---

[5] In this order the Commission did modify its previous determination and allowed the rate filing to proceed on rates in excess of contract demand. On application for rehearing, Cities pointed out that the contracts provided for increases in demand beyond the amounts stated in the contracts upon notice to KU. The Commission accepted this, and the final order of the Commission again provided that the entire rate filing with respect to the Cities should be rejected subject to a Section 206 investigation as to the consistency of the rates with the public interest. (Pet. App. 33a-36a). KU has not raised any issue with respect to the alleged excess of demand over contract amounts in either the court of appeals or this Court.

> "We think the Commission rightly held that state law had no proper role in the process of interpreting the contracts. Each agreement in force when KU filed for the rate increases in issue was executed after the Commission assumed jurisdiction over the sales in question, or after it became evident that the Commission was endeavoring to do so. In each instance the agreement unambiguously designates a fixed rate." (Pet. App. 14a) (footnotes omitted).

In consideration of the legal inapplicability of the prior practice, Judge Robinson concluded that KU presented to the FPC no factual issue for investigation. (Pet. App. 18a).

ARGUMENT

I. The Questions KU Seeks to Have the Court Consider Are Irrelevant to This Case

The first question posed by KU [6] in its petition, while interesting, bears no relationship to the questions actually presented by this case. It assumes, as its premise, that the contracts were entered into when KU's wholesale service was exclusively under the jurisdiction of the Kentucky Public Service Commission. This is simply not so. The Federal Power Commission asserted jurisdiction over KU's rates to Cities in 1962 (R. 662), and KU filed its rates with the FPC in September, 1962 (Pet. 8). The contracts in question were entered into

[6] "Whether . . . an electric utility's filing with the Federal Power Commission of its contracts for wholesale service *which had been entered into when such service was exclusively under the judisdiction (sic) of a state public service commission* (a) terminates that utility's pre-existing rights under state law and the contracts to file unilateral rate changes (unless such rights have been expressly preserved in the contracts), and (b) makes state law thereafter irrelevant to the interpretation of those contracts and subsequent amendments unless expressly incorporated by reference." (Pet. 2, emphasis added).

at various times over the period 1963-1973. These facts are undisputed on this record. Thus, the first question presented by KU, which concerns the effect of state law on electric service contracts entered into when such service was exclusively under state jurisdiction, is simply not presented in this case.

The second question presented by KU, namely, whether a hearing was required to consider so-called "extrinsic evidence," is also irrelevant, since the Commission and the court of appeals considered KU's allegations as to what that evidence would show and remained unpersuaded that it raised any question of ambiguity in the contracts. The facts alleged by KU were uncontested by the Cities. The "extrinsic evidence" KU sought to show related to previous contracts between the parties and to unreported *ex parte* telephone conversations and meetings between KU and FPC staff members in 1965. Assuming the truth of all KU's allegations concerning the meaning of prior contracts, those facts are irrelevant to the interpretation of the subsequent contracts which are the subject of this case. Assuming the truth of all KU's allegations concerning *ex parte* communications with the FPC staff in 1965, there is no way under any interpretation of contract law that KU and members of the FPC staff could by *ex parte* agreement alter the meaning or intent of KU's contracts with the Cities. A hearing for the purpose of adducing such evidence would thus have been meaningless, and the Commission correctly refused to waste its time on such an exercise.

II. The Petition for a Writ of Certiorari Raises No Issue Worthy of the Court's Consideration

The question actually presented in this case involves nothing more than technical contract interpretation. The Federal Power Commission and the Court of Appeals for the District of Columbia Circuit have both determined

that under this Court's decisions in the *Mobile-Sierra-Memphis* cases, the contracts in force at the time of the latest rate filing unambiguously provide for a fixed rate which cannot be unilaterally changed by KU through a rate filing. The court of appeals affirmed the Commission which had rejected KU's rate filing on the ground that the unilateral rate increase was impermissible under the contracts.

The rule established by the *Mobile-Sierra-Memphis* decisions is not in dispute in this case, and it is well-settled. As stated by the Court of Appeals for the District of Columbia Circuit:

> "The rule of *Sierra*, *Mobile* and *Memphis* is refreshingly simple: the contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid." *Richmond Power and Light* v. *FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973).

While it is true that there has been a considerable amount of litigation arising before the Federal Power Commission under the *Mobile-Sierra-Memphis* doctrine in recent years, the central issue in each case has been the existence of a contractual obligation of a utility to maintain a fixed rate. Each case involves interpretation of the contract provisions there in issue. Different contract language naturally gives rise to different conclusions, both as to the utility's contractual ability to unilaterally file a rate increase and as to the ambiguity or lack of ambiguity of the contract on that point. In terms of the general rules of federal law, there is little that can be said beyond what this Court has already determined in the *Mobile-Sierra-Memphis* trilogy, short of taking up individual cases of contract interpretation.

The interpretation of rate contracts "involves matters peculiarly within the area of the Commission's special

competence." *Memphis*, 358 U.S. at 114. The facts upon which KU presented its claim were made known to the FPC and were undisputed by the Cities.[7] In such circumstances, no evidentiary hearing was required because all that remained to be done was for the FPC to draw the appropriate inferences and legal conclusions from undisputed facts. *Anti-Defamation League of B'nai B'rith* v. *F.C.C.*, 403 F.2d 169, 171 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 930 (1969).

III. There Is No Inconsistency With Prior Decisions of the Court of Appeals for the District of Columbia Circuit.

Petitioners suggest that the court of appeals decision is contradictory to the holding of other panels of the same circuit. However, the prior cases of the circuit are consistent with the legal principle applied in this case that unambiguous language used in a rate contract may be the basis for summary rejection of a rate filing. In *Sam Rayburn Dam Electric Cooperative* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975) the court of appeals reversed a determination by the FPC that the contracts in issue were *Memphis* type contracts which allowed Gulf States to make unilateral rate filings. In that case the court of appeals considered extrinsic matters to the contract, developed in the record, because the provisions of the contract were "arguably ambiguous." 515 F.2d at 1003. Because all the evidence developed on the record in that case tended to show that *Sierra*-type contracts were intended, the court remanded the case to the FPC with instructions to reject the proposed rate increase.

In the companion case, *Mid-South Electric Coop.* v. *FPC*, 515 F.2d 998 (D.C. Cir. 1975), the court of ap-

---

[7] These factual contentions of KU were set forth in the Application for Rehearing to the Initial Order of the Commission (R. 327 *et. seq.*).

peals required the FPC to conduct a factual inquiry into the possible subsequent modifications of a *Sierra* contract, by the conduct of the parties after the execution of the agreement. Mid-South Electric Coop there alleged that the quantity of power available to it under the fixed rate contract had been increased by the subsequent modifications. Unlike prior negotiations leading up to an integrated agreement, evidence of subsequent modifications of an agreement is always considered admissible. *Canal Barge Co.* v. *Griffith*, 480 F.2d 11, 24-25 (5th Cir. 1973), *modified* 513 F.2d 911 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3202 (Oct. 7, 1975).

With reference to *Richmond Power & Light* v. *FPC*, 481 F.2d 490, (D.C. Cir. 1973), *cert. denied sub nom. Indiana & Michigan Electric Co.* v. *FPC*, 414 U.S. 1068 (1973), the petitioners state that the court "looked at extensive extrinsic evidence in interpreting whether the *unambiguous* language of the contractors involved in those cases permitted unilateral rate filings." (Pet. 34). However, in that case there was disagreement between the parties as to the meaning and intent of contract language specifically referencing the rate level to rate changes permitted by the state regulatory agency. The court of appeals observed that the rates were filed with the FPC before the execution of the contract, and therefore the parties must have been aware of the impending change in ratemaking authority at the time the contract was made. The court pointed to the apparent purpose of incorporating a state regulated rate into a rate contract subject to FPC jurisdiction, which was to avoid discrimination between the wholesale and retail rates.

There is thus no inconsistency between these three cases and the case at bar. Differences in result are due to differences in the contracts and facts presented to the court.

IV. There Is No Conflict Among the Circuits

Petitioners cite *Shell Oil Co.* v. *FPC*, 334 F.2d 1002, 1007 (3rd Cir., 1964) for the proposition that the decision of the Court of Appeals for the District of Columbia Circuit in this case is in conflict with another circuit. In the *Shell* case, the contract between the regulated gas company and its customer contained a "most favored nations" clause which guaranteed the gas company the benefit of any higher price paid by its customer to its competitors in a specified geographic area. The price comparison specified in the contract was based upon several "pertinent factors" including gas quality, delivery pressure and gathering and compressing arrangements. 334 F.2d at 1005. When the regulated company filed for higher rates to be paid by its customers, it justified its filing under the terms of the contract by pointing to another contract with a different customer, the overall terms of which it claimed provided for a higher price, thereby activating the "most favored nations" clause. The customer disputed the company's evaluation of the prices. Naturally, the court held that in these circumstances a factual hearing was required to resolve the disputed factual issue. Here, by contrast, there is no genuine factual dispute. Further, the issue was raised in the *Shell* case in the context of whether the FPC had authority to conduct hearings after accepting the filing of the regulated gas company. There is no similar issue in this case.

V. KU's Complaint With Respect to Section 206 Relief Is Not Properly Raised

KU concludes its petition with an attack on the criteria in the *Sierra* case governing changes ordered by the Commission in fixed rate contracts under Section 206

of the Federal Power Act. (16 USC 824e).[8] No question involving the so-called *Sierra* criteria is raised in this case. The Commission has not here refused to consider a change in KU's rates pursuant to Section 206; indeed, such a hearing was ordered. (Pet. App. 33a-36a). If that avenue of relief has been a "dead end" for KU (Pet. 36), it is not the fault of the Commission, since the Commission has not had occasion to determine whether KU can satisfy these criteria.[9]

While the *Sierra* criteria may well be the next case KU brings to this Court, it is not *this* case.

---

[8] The Court there stated that:

> "the sole concern of the Commission would seem to be whether the rate is so low as to adversely affect the public interest—as where it might impair the financial ability of the public utility to continue its service, cast upon other consumers an excessive burden, or be unduly discriminatory". *Sierra*, 350 U.S. at 355.

[9] The Section 206 investigation and hearing instituted by the Commission's order in this case (Pet. App. 33a-36a) was terminated upon motion of Cities with the consent of KU.

CONCLUSION

Because no substantial issue of federal law has been raised, Cities respectfully submit that the Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be denied.

Respectfully submitted,

SANDRA J. STREBEL
Attorney for the Electric and Water Plant Board of the City of Frankfort, Kentucky, et al.

Law Offices Of:

SPIEGEL & MCDIARMID
2600 Virginia Avenue, N.W.
Washington, D.C. 20037
(202) 333-4500

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

No. 75-1423

In the Supreme Court of the United States

OCTOBER TERM, 1975

KENTUCKY UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

DREXEL D. JOURNEY,
General Counsel,

ROBERT W. PERDUE,
Deputy General Counsel,

ALLAN ABBOT TUTTLE,
Solicitor,

JOHN J. LAHEY,
Attorney,
Federal Power Commission,
Washington, D.C. 20546.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

---

1. On May 1, 1973, petitioner filed with the Federal Power Commission a proposed rate increase for the sale of electric power to eleven of its all-requirements customers in Kentucky ("Cities") based on contracts with those customers executed between 1963 and 1972. Cities petitioned to intervene in the proceeding and moved to reject the filing. The Commission rejected the proposed rates on the ground that the underlying contracts were fixed rate contracts without any provision for unilateral rate increases (Pet. App. 22a-26a). Petitioner filed an application for rehearing, asserting that Kentucky law allowed unilateral rate increases in every instance and that the contracts should be viewed in light of that law to determine the contractual intent of the parties. The Commission denied rehearing, noting that the

contracts were entered into after petitioner had begun filing its schedules with the Commission and that Kentucky law was therefore irrelevant (Pet. App. 27a-32a).

On petition for review, the court of appeals affirmed the Commission's order (Pet. App. 1a-19a). It found that all the contracts were executed after the Commission had assumed jurisdiction and that "[i]n each instance the agreement unambiguously designates a fixed rate" (Pet. App. 14a). The court also concluded that the Commission properly rejected the filing without an evidentiary hearing, because the issue presented was a purely legal question and the Commission is authorized "to turn down a filing that is 'patently a nullity as a matter of substantive law'" (Pet. App. 18a-19a).

2. Petitioner argues that, since the contracts in question were similar to earlier contracts made at a time when petitioner was subject to state regulation, the court of appeals erred in concluding that "state law had no proper role in the process of interpreting the contracts" (Pet. App. 14a). As the court correctly stated, however (Pet. App. 14a-15a; footnotes omitted):

> Each agreement in force when [petitioner] filed for the rate increases in issue was executed after the Commission assumed jurisdiction over the sales in question, or after it became evident that the Commission was endeavoring to do so. In each instance the agreement unambiguously designates a fixed rate. There is no reservation of a right to alter the contract unilaterally, nor any reference to rate changes or to procedures for such changes. By the same token, there is no basis upon which Kentucky law might be applied to contradict the unmistakable terms of the contracts in regard to rates.

Petitioner claims that this reasoning "completely undercuts the foundation principles of the *Mobile-Sierra-Memphis* doctrine" (Pet. 16, 22).[1] To the contrary, however, the court's decision is wholly faithful to the principles of those decisions. The rule is that "[t]he contract between the parties governs the legality of the filing." *Richmond Power & Light* v. *Federal Power Commission*, 481 F. 2d 490, 493 (C.A. D.C.), certiorari denied *sub nom. Indiana & Michigan Electric Co.* v. *Anderson Power & Light*, 414 U.S. 1068. The parties' freedom to control the legality of the rate filings is in no way compromised by the decision of the court of appeals. The parties remain "free to forge a going-rate agreement by a reference to state-law principles which impart that effect" (Pet. App. 9a-10a).

The contracts here, however, unambiguously provide for fixed rates (Pet. App. 14a). As Judge Lumbard stated in his concurring opinion, "[t]he court correctly decline[d] * * * to step outside the corners of an unambiguous contract" (Pet. App. 20a; and see *id.* at 21a, n. 5). Of course, the intent of the contracting parties should control, and "where the decision involves the interpretation of the parties' intent as revealed in the language of the contract, it is proper to defer to the Commission's expertise if its decision is 'amply supported both factually and legally.'" *Gulf States Utilities Company* v. *Federal Power Commission*, 518 F. 2d 450, 457 (C.A. D.C.).

3. Petitioner contends that it should have been afforded an evidentiary hearing "in order to establish the intent of the parties in light of the long history of commercial

---

[1]The reference is to this Court's decisions in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348; *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103.

relationships between them under the exclusive regulatory authority of the Kentucky Commission" (Pet. 24). The court of appeals found that argument unpersuasive (Pet. App. 18a-19a; footnotes omitted):

> The obvious answer is that [petitioner] presented no material factual issue for investigation at such a hearing. Construction of unambiguous features of a written contract is a legal problem; "the legal effect of reasonably clear terms of a contract," we have said, "is a question of law...." We have also compared a motion to reject a rate-increase filing with "a motion to dismiss on the face of the pleading" and we have recognized the Commission's authority to turn down a filing that is "patently a nullity as a matter of substantive law."

Petitioner fails to overcome the impediment that its unambiguous contracts provide for fixed rates. It merely asserts that "Kentucky law should be carried over to [the parties'] continuing relations before the FPC" (Pet. 22). But the contracts make no explicit reference to Kentucky law, and there is no reason to suppose that such an unstated reference was intended. The parties adopted the relevant contractual language after it had become clear that their contractual relationship would be subject to Federal Power Commission jurisdiction. See, *e.g., Federal Power Commission* v. *Southern California Edison Co.*, 376 U.S. 205. In these circumstances, the Commission properly rejected petitioner's contentions without a hearing.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DREXEL D. JOURNEY,
General Counsel,

ROBERT W. PERDUE,
Deputy General Counsel,

ALLAN ABBOT TUTTLE,
Solicitor,

JOHN J. LAHEY,
Attorney,
Federal Power Commission.

JUNE 1976.

Supreme Court, U. S.
FILED
AUG 9 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER KENTUCKY UTILITIES COMPANY

JEROME C. MUYS
DEBEVOISE & LIBERMAN
806 15th Street, N.W.
Washington, D.C. 20005
(202) 393-2080

MALCOLM Y. MARSHALL
OGDEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40270
(502) 582-1601

Attorneys for Kentucky Utilities Company, Petitioner

August 6, 1976

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

1. The Cities' Contention That The Facts Alleged By KU in Requesting a Hearing Were Undisputed by the Cities Is Fallacious 1

2. The Commission's Interpretation of the Disputed Contracts Did Not Involve an Exercise of Its Expertise and Is Therefore Entitled to No Deference on Review 3

3. The Salutary Consequences of Affording a Hearing on Disputed *Mobile-Sierra* Issues Has Been Vividly Demonstrated by a Recent Initial Decision by an FPC Administrative Law Judge 4

4. A Recent FPC Decision Demonstrates the Almost Absolute Impossibility of Obtaining Relief under Section 206(a) of the Federal Power Act After a Contract Has Been Held to Contain Fixed Rate Provisions 5

APPENDIX A—Extracts of Kentucky Utility Company's briefs before the Court of Appeals 1a

APPENDIX B—FPC Opinion No. 764 in *Metropolitan Edison Company,* Docket No. E-8832, issued June 1, 1976 ..... 9a

APPENDIX C—"Order Denying Rehearing" in *Metropolitan Edison Company,* Docket No. E-8832, issued July 30, 1976 ..... 15a

Page

COURT DECISIONS:

Borough of Lansdale v. *FPC*, 494 F.2d 1104 (D.C. Cir. 1974) 4

FPC v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956). 5

Skelly Oil Co. v. *FPC*, 532 F.2d 177 (10th Cir. 1976).. 3

Texas Gas Trans. Corp. v. *Shell Oil Co.*, 363 U.S. 263, 268-70 (1960) 3

FEDERAL POWER COMMISSION DECISIONS:

Metropolitan Edison Company, Docket No. E-8832, Opinion No. 764, issued on June 1, 1976, *rehearing denied*, July 30, 1976 5-6

Philadelphia Electric Company, Docket Nos. E-7795 and E-7989, issued on June 28, 1976 4-5

STATUTES:

Federal Power Act

§ 205, 16 U.S.C. 824d 4

§ 206(a), 16 U.S.C. 824e(a) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1423

KENTUCKY UTILITIES COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION

REPLY AND SUPPLEMENTAL BRIEF OF PETITIONER KENTUCKY UTILITIES COMPANY

Pursuant to Rule 24(4) and (5) of the Court, Kentucky Utilities Company ("KU") submits this brief in reply to those arguments first raised in the briefs in opposition to KU's petition for a writ of certiorari which were filed by the Electric and Water Plant Board of the City of Frankfort, Kentucky, *et al.* ("Cities") and the Federal Power Commission ("FPC" or "Commission") and to call to the Court's attention several relevant decisions emanating from the FPC after KU's petition was filed.

1. The Cities' Contention That the Facts Alleged by KU in Requesting a Hearing Were Undisputed by the Cities Is Fallacious.

The Cities contend that "the facts upon which KU presented its claim were made known to the FPC *and*

were undisputed by the Cities" (Br. 11, emphasis added), and that "the facts alleged by KU were *uncontested* by the Cities" (Br. 4, emphasis added). This is the first time in this long controversy that the Cities have alleged that the facts upon which KU relies and which it requested an opportunity to prove before the Commission were "uncontested" and "undisputed". The Cities previously have always simply characterized KU's factual allegations as to the practical construction of the contracts by the parties and the Kentucky Public Service Commission prior to KU's filing of the contracts with the FPC as "irrelevant" and "immaterial.[1] However, even when they were taking that carefully framed position as to those pre-1963 underlying facts, there was clearly a major dispute between them and KU with respect to what took place *after* 1963 when KU effected its two substantial rate reductions to the Cities in 1965 and 1969.

For example, in their initial motion to reject KU's rate increase filing before the FPC the Cities asserted that "both KU and the Federal Power Commission have in the past treated KU's contracts with the Cities as fixed rate contracts" and that "the FPC has consistently refused to allow unilateral rate changes to be made by KU under these contracts." (R. 303, 310). KU disputed that assertion in its answer to Cities' motion (R. 356-57) and in its application for rehearing of the Commission's order of June 29, 1973 rejecting KU's rate filing (R. 380-81, 384-86).

---

[1] "Motion of Eleven Wholesale Customers To Reject Rate Filing, Protest, and Petition to Intervene", FPC Docket No. E-8172, June 14, 1973, p. 11 (R. 310); "Brief for Electric and Water Plant Board of the City of Frankfort, *et al.*," C.A.D.C. No. 73-2085, February 8, 1974, pp. 14, 18.

The Cities' brief before the court of appeals reiterated their view that "the contracts here in issue have thus been consistently treated as fixed-rate contracts" (p. 20), which KU stressed in its briefs was one of the principal points it wished to refute in the hearing it was seeking. To reveal the utter fallacy of the Cities' brazen assertion that the facts surrounding the 1965 and 1969 rate reductions were "undisputed", KU sets out in Appendix A to this brief extracts from its briefs before the court of appeals presenting its version of those events which it was denied an opportunity to prove.

They clearly demonstrate, contrary to the Cities' present representation to the Court, that there was a major factual dispute with respect to the practical and administrative construction of the disputed contracts which the FPC refused to ventilate in a hearing.

2. The Commission's Interpretation of the Disputed Contracts Did Not Involve an Exercise of Its Expertise and Is Therefore Entitled to No Deference on Review.

The FPC's memorandum in opposition asserts (p. 3) that the court of appeals properly deferred to the Commission's interpretation of the disputed contracts because it allegedly involves the exercise of the Commission's regulatory expertise. Although the Commission did not make that argument below, the court of appeals did rely on it (Pet. App. 18a). However, reliance on that doctrine is misplaced because there are no questions of expertise involved here, only the application of "ordinary rules of contract law."[2]

---

[2] *Texas Gas Trans. Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 268-70 (1960), followed in *Skelly Oil Co.* v. *FPC*, 532 F.2d 177 (10th Cir. 1976) which collects the authorities rejecting this boilerplate argument of the FPC.

3. The Salutary Consequences of Affording a Hearing on Disputed *Mobile-Sierra* Issues Has Been Vividly Demonstrated by a Recent Initial Decision by an FPC Administrative Law Judge.

KU argued unsuccessfully before the Commission and the court of appeals that it was entitled to a hearing to demonstrate that there was no intent by either KU or the Cities to enter into "fixed rate" agreements, stressing that the Commission's power to suspend the filed rates pending a hearing would fully protect the Cities if the Commission should ultimately conclude that the contracts were in fact fixed rate agreements (Pet. 24-28). A recent decision issued by an FPC administrative law judge in *Philadelphia Electric Company* (Docket Nos. E-7795, E-7989) on June 28, 1976 confirms KU's contention that an evidentiary hearing is essential to put barebone electric rate provisions, such as those in KU's contracts with the Cities, in proper perspective.

The *Philadelphia Electric* decision resulted from a hearing under section 206(a) of the Federal Power Act (16 U.S.C. § 824e(a)) conducted by the FPC after the Court of Appeals for the District of Columbia Circuit in *Borough of Lansdale* v. *FPC*, 494 F.2d 1104 (1974), had held, without the benefit of a hearing record below, that language in Philadelphia Electric's contract with Lansdale precluded unilateral rate increase filings by Philadelphia Electric under section 205 of the Federal Power Act (16 U.S.C. § 824d). In his decision in the section 206 proceeding, Judge Southworth was required to deal with the contract interpretation issue even though it was not before him for decision, inasmuch as it had been raised by Lansdale in another context. After reviewing the extensive evi-

dence surrounding the negotiation of the Lansdale contract, he concluded as follows (Mimeo, p. 26):

> The 1971 contract has been ruled [by the court of appeals] to be a fixed rate contract, and that is the law of the case under the currently effective order of the Commission. The evidence shows, nevertheless, that neither Philadelphia nor Lansdale negotiated for that result. On the contrary, the evidence which Lansdale invited demonstrates that both parties expected the rates to increase, upon a filing by Philadelphia, soon after, if not contemporaneously with, the extension of service to Lansdale.

4. A Recent FPC Decision Demonstrates the Almost Absolute Impossibility of Obtaining Relief under Section 206(a) of the Federal Power Act After a Contract Has Been Held To Contain Fixed Rate Provisions.

In its petition KU stressed that a vitally important reason for requiring the FPC to grant a hearing on disputed contract issues is the virtual impossibility of obtaining relief from the Commission under section 206(a) of the Federal Power Act after a contract has been held to embody fixed rates in light of the Commission's unduly constricted view of the "public interest" criteria which this Court held in *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348 (1956), would justify modification of fixed rate contracts (Pet. 35-38). The Commission's myopic view of the *Sierra Pacific* standards is vividly illustrated by its decision in *Metropolitan Edison Company* (Opin. No. 764) issued on June 1, 1976, a copy of which is included as Appendix B to this brief.[3] In that case the Commission refused to

---

[3] The Commission issued an "Order Denying Rehearing" on July 30, 1976 which is included as Appendix C.

modify a contract entered into between the Borough of Middletown, Pennsylvania and Met Ed's predecessor-in-interest in 1906 by which Middletown was to receive its entire power supply requirements (whatever they may be) "in perpetuity" for 1 cent per kilowatt hour. That contract is currently yielding Met Ed $500,000 less per year than it would receive under the rates presently being charged Met Ed's other comparable wholesale customers, who pay rates approximately 150 percent higher than Middletown. The Commission's opinion speaks for itself, and fully validates KU's contention as to the hopelessness permeating the electric utility industry in connection with the Commission's application of the *Mobile-Sierra-Memphis* doctrine.

Respectfully submitted,

JEROME C. MUYS
DEBEVOISE & LIBERMAN
806 15th Street, N.W.
Washington, D.C. 20005
(202) 393-2080

MALCOLM Y. MARSHALL
OGDEN, ROBERTSON & MARSHALL
1200 One Riverfront Plaza
Louisville, Kentucky 40270
(502) 582-1601

Attorneys for Kentucky Utilities Company, Petitioner

August 6, 1976

APPENDIX

APPENDIX A

"Brief for Petitioners" (January 7, 1974), pp. 27-33.

In 1965 there were informal discussions between the Company and the FPC Staff concerning a possible rate reduction to the municipal wholesale customers. At a meeting on July 13, 1965 it was agreed by the Staff and Kentucky that Kentucky's wholesale contracts then on file did not preclude a unilateral rate reduction on Kentucky's part, except that Kentucky contended that its contracts with Princeton, Fulton and Paducah were "no changes" agreements which had resulted from lengthy negotiations incident to the cities acquiring the Company's distribution facilities as a prelude to discontinuing commercial relations with the Company. (R. 411). On August 1, 1965, Kentucky filed a $120,000 rate reduction for its wholesale customers as rate schedule WPS-3. (R. 355-410). After a telephone conversation between Company officials and the FPC Staff, the Acting Chief of the FPC's Bureau of Power wrote the Company on August 16, 1965 indicating that some revisions in the filed rate schedules would be appropriate. (R. 411). He further stated that the Staff had reviewed the Princeton, Fulton and Paducah contracts and had concluded that they contained "no restrictions in regard to changes of the WPS rate" and that a rate reduction of $96,000 was warranted for those three cities and Corbin.

The Staff's position was apparently based on the fact that the rate provisions of the Princeton, Fulton, Paducah and Hickman contracts, although embodied in a long agreement covering the sales of the Company's facilities to those cities, was quite similar to the language in the short form contracts with the WPS-5 customers. The Fulton contract, for example, provided as follows:[1]

---

[1] R. 69. Fulton argued that this language contained no restrictions on Kentucky's right to effect a rate change by merely filing a new rate with the Kentucky Commission (R. 422-23):

"Article 5 of our agreement states that 'the applicable rate

> "Seller will sell and Purchaser will buy all the power and energy requirements of both the City and the Fringe Systems for the period beginning on the closing date and ending on a date five years thereafter and for successive annual periods thereafter. . . . The applicable rate shall be Seller's published rate designated as WPS, a copy of the applicable provisions of which . . . is attached hereto. . . .

By letter of August 20, 1965, the Company advised the Acting Chief of the FPC's Bureau of Power that it would be willing to file a revised rate (WPS-3R) reflecting an annual reduction of $121,794 to its ten WPS-5 wholesale customers and to include a $24,280 reduction for Corbin. The Company reiterated its position that the contracts with Princeton, Fulton and Paducah were fixed rate contracts. Nevertheless, Kentucky stated that it "would be willing to offer the new rate to these three cities on a five year contract, but we doubt very much that the three who are expecting power from TVA will be interested." Consequently, it proposed to file the new rate only for its ten WPS-5 wholesale customers and Corbin (R. 412-13). After agreement had been reached on the level of rate reduction, Kentucky wrote the Staff on August 27, 1965, indicating that it had been routinely obtaining certificates of concurrence from utility customers where interstate transactions were involved and suggested that perhaps such a procedure might be appropriate for the contemplated rate reduction. (R. 414). The Company also pointed out a further distinction between the Princeton, Fulton, Paducah and Hickman contracts and those with its WPS-5 wholesale customers.

---

shall be Seller's published rate designated as WPS'. There is no indication in any part of the agreement setting forth that there would be any restrictions in regard to changes of the WPS rates. It is conceivable that if the Kentucky Utilities Company had requested a higher rate, they would have published the higher rate as their existing WPS rate."

By letter of September 10, 1965, Kentucky formally withdrew its August 1 WPS-3 filing and substituted the WPS-3R rate schedules, stating that it was also making a concurrent filing with the Kentucky Commission. (R. 415-17). With respect to Princeton, Fulton, Paducah and Hickman, the Company reiterated its position that those contracts were "no change" agreements, and that it was not filing a rate reduction for those cities. (R. 147). It is obvious from the foregoing that there was agreement between the Company and the FPC Staff that the contracts between Kentucky and th ten WPS-5 customers were not fixed rate agreements.

Subsequent to its filing, Kentucky informed each customer by letter of the withdrawal and new filing and, in accordance with its earlier suggestion to the FPC Staff, it obtained signatures from the various customers under the following statement:[2]

> Electric rate schedule WPS-3R, attached hereto, is accepted as part of existing contract with Kentucky Utilities Company in place of rate schedule designated therein.

The WPS-3R rate was accepted for filing by a letter of October 22, 1965 from the Secretary of the Commission and made effective as of September 1, 1965. The Secretary's letter made specific reference to Kentucky's contention that it had fixed rate contracts with Princeton, Fulton, Paducah and Hickman and stated that it was requesting comments of those four cities on the point. (R. 425). Since Kentucky had not raised a similiar objection to a rate reduction for the WPS-5 customers, it was clear that neither the Company nor the Staff viewed them as "no change" agreements. Copies of the Secretary's letter were sent to all of the other wholesale customers

---

[2] R. 199, 209, 219, 229, 238, 255, 263, 273, 316.

(R. 425-26), so that they were all clearly on notice that Kentucky did not view their contracts as fixed rate contracts, as was already apparent from Kentucky's filing of the WPS-3R rate reduction.

Much of the foregoing activity between the Company and FPC Staff on the WPS-3R rate reduction involved informal conferences and telephone conversations as to which there is no official record other than the correspondence already cited, some of which is not even in the Commission's official files. Nevertheless, the Commission has concluded, without any citation of supporting evidence, that KU's conduct in filing the WPS-3R rate establishes that the underlying contracts were fixed rate agreements (R. 680):

> "A second reason for rejecting KU's contention that the present agreements are "going rate" contracts is the conduct of KU itself. On August 1, 1965, KU made a unilateral filing with the Federal Power Commission and the Kentucky Commission substituting Rate Schedule WPS-5 for WPS-3R. [sic]. The Federal Power Commission informed KU that its filing would not be accepted without customer approval. Ku withdrew the filing and submitted a new one with customers' concurrence which was accepted on October 22, 1965."

The Commission's characterization of what transpired in connection with the WPS-3R filing is a gross distortion of the facts surrounding that filing. The Commission relies only on erroneous conferences to support its conclusion, and the actual circumstances of the filing can only be fully developed at a hearing. What is clear from the limited correspondence in the Commission's official files, which the Commission presumably did not review carefully, is that there was absolutely no dispute that Kentucky had ample authority to file the unilateral rate reduction for its ten

WPS-5 customers. Indeed Staff not only agreed on that interpretation of the WPS-5 contracts, but disputed Kentucky's contention that its other contracts with Princeton, Paducah, Hickman and Fulton were "no change" contracts. It is wholly misleading to assert, as the Commission does, that the reason Kentucky withdrew its August 1, 1965 filing centered on the absence of "customer approval". The available record is abundantly clear, and Kentucky would establish at a hearing, that the August 1 filing was withdrawn solely because the Staff had raised further questions about the level of reduction proposed and the propriety of similarly reducing rates for Princeton, Paducah, Fulton and Hickman.

While Kentucky did have its customers indicate their acceptance of the WPS-3R rate, there is nothing in the record to suggest that it did so because either it or the Staff thought that the WPS-5 rate was "fixed". The reason for that action is not clear from the available correspondence in the record, but Kentucky contends that it did so as a routine procedural matter in accord with its continuing cooperation with the Commission Staff dating back to 1962. If Kentucky had believed that it had bargained for and obtained a fixed rate when executing the WPS-5 contracts in 1963, it obviously would have asserted its contractual rights a year and a half later and resisted a rate decrease amounting to $122,000 annually to those customers and $24,280 to Corbin. It did not do so. However, in an action which fully confirms its interpretation of the WPS-5 contracts, it did resist rate reductions to Princeton, Paducah, Hickman and Fulton on the grounds that it had negotiated fixed rate agreements with those cities as a part of the consideration of the purchase price for the Company's facilities condemned by those cities. Ironically, the Staff opposed Kentucky's interpretation of those contracts and supported the claims of those cities in later proceedings that they were entitled to the same

rate reduction afforded the WPS-5 customers, a dispute which was finally resolved by Kentucky agreeing to refund those cities the portion of the difference between billings at the rate charged those cities and the lower WPS-3R rate charged the ten WPS-5 customers.[3] Having been persuaded by the Staff to grant the WPS-3R reduction to the WPS-5 customers in 1965, and having subsequently been forced to afford Hickman, Paducah, Princeton and Fulton equal treatment on the ground that their contracts, like the WPS-5 contracts, were not fixed rate agreements, Kentucky has now been denied the right to file a proposed rate increase for its municipal wholesale customers on the ground that those same contracts now must be construed as precluding unilateral filings. The Commission and the customers simply cannot have it both ways. Kentucky contends that the original interpretation of the WPS-5 contracts by the Company and the Staff was correct, and that if the matter may not technically be *res adjudicata,* the Commission should in any event be estopped from abandoning that earlier interpretation.

"Reply Brief for Petitioner" (February 25, 1974), pp. 10-12

III. THE DISPUTED FACTUAL CIRCUMSTANCES SURROUNDING THE EXECUTION OF THE CONTRACTS, THEIR INTERPRETATION BY KU AND THE FPC STAFF, AND THEIR PRACTICAL CONSTRUCTION BY KU AND THE CITIES REQUIRE A HEARING.

The Commission brief does not attempt to answer Kentucky's version of the events surrounding its 1963 and 1965 rate reduction to the Cities, which KU asserts clearly shows that the FPC Staff at that time clearly recognized that the service agreements were not fixed rate contracts. (Br. 26-30). Instead it falls back on the erroneous characterization of the 1965 events by the Commission in its order below. Similarly, it ignores KU's explanation of the 1969 fuel clause filing and reiterates the Commission's conclusion below that "both these filings by KU and its subsequent action in accordance with the Commission's directives shows a clear intent on the part of KU to treat the agreements as fixed rate contracts." (Br. 25-26). The Cities take a similar position (Br. 19-20). Neither of them even addresses, let alone answers, KU's detailed exposition and explanation of the disputed circumstances.

[3] *Electric Plant Boards of the Cities of Paducah, Princeton, Fulton and Hickman, Kentucky* v. *Kentucky Utilities Company,* 40 F.P.C. 978 (1968).

The contention that KU, its customers and the Commission Staff have consistently treated the service agreements as fixed rate contracts is patently and demonstrably false. The only contracts that KU ever contended were fixed rate agreements were those with Princeton, Fulton and Paducah, a contention which the Staff disputed and as a result of which KU eventually agreed to grant those Cities the same reductions which the present intervenor Cities received in 1965. (KU Br. 32-33). As a result of that experience, when KU subsequently negotiated an actual fixed rate contract of December 1, 1967, with the Jackson Purchase Rural Electric Cooperative, it took pains to make its intention abundantly clear. That contract, executed at a time after all of the currently effective contracts had already been interpreted as "going rate" contracts by KU and the Commission Staff and that interpretation communicated to all of the Cities,[4] provides as follows (para. 13);

[4] KU Br. 27-30. We digress to note the Cities' gratuitous innuendo at page 22 of its brief where it refers to "unreported *ex parte* meetings and telephone conversations between KU and Commission staff members," and rather awkwardly questions the propriety of those meetings and conversations. The technique of painting a black hat on your opponent rather than addressing his arguments is a standard practice of some lawyers. Here, however, the effort seems misguided. There were no formal proceedings under way, but only informal negotiations between Staff and KU, which is a common

> It is the intent of the parties that the rate and other provisions affecting Cooperative's costs remain constant throughout the term of this contract. It is agreed that neither party will seek a change in the rate or in any other provision which would increase or decrease Cooperative's costs.

It is incomprehensible that KU would tailor such language for Jackson Purchase if in fact it viewed its boilerplate, short form contract language as already precluding rate changes as the Commission and Cities now contend.

---

practice at the Commission. Hence the events referred to hardly can be characterized as "ex parte" in any customary sense of the phrase. In any event, the results of those negotiations were fully communicated to the Cities, including the views of KU and Staff that the contracts were not fixed rate agreements. KU Br. 30. There were no objections to that conclusion from the Cities.

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Opinion No. 764

Metropolitan Edison Company

Docket No. E-8832

Opinion and Order Affirming and Adopting Initial Decision

Issued: June 1, 1976

APPEARANCES

George F. Bruder and *Albert R. Simonds, Jr.* for Metropolitan Edison Company

Phillip D. Ardery for Borough of Middletown, Pennsylvania

Daniel P. Behuniak for Staff, Federal Power Commission

DUNHAM, Chairman:

This case arises out of Metropolitan Edison Company's (Met-Ed) petition filed March 6, 1974, requesting the Commission to investigate that company's wholesale rate to the Borough of Middletown, Pennsylvania. That rate is fixed by contract dated July 14, 1906, at 1¢ per kwh for as much power as Middletown requires. The petition further requested that the contract rate be replaced by Met-Ed's tariff rate RT, applicable to the company's other 69 Kv wholesale customers. Pursuant to the Commission's order issued June 6, 1974, a hearing on the petition was held December 11 and 12, 1974, before Administrative Law Judge Jensen. The Judge's initial decision was issued

September 2, 1975, and exceptions were filed by Staff and Metropolitan Edison. The Borough of Middletown, the sole intervenor in the case, subsequently filed a Brief Opposing Exceptions as did Staff.

The 1906 contract was made between York Haven Water & Power Company (Met-Ed's predecessor) and the Borough and was accepted on July 14, 1906. The parties agreed that the utility would supply the borough with electricity at 1¢ per Kwh. The contract also provided that it would continue: "in full force indefinitely until terminated by the Borough upon 6 month's notice in writing to the Company." Met-Ed alleges that this contract is unjust and unreasonable since it no longer covers even operating expenses and thereby impairs the company's ability to raise capital and carry out its service obligations. Further the contract is alleged to be discriminatory and to constitute an undue burden on Met-Ed's other customers.

The Presiding Administrative Law Judge found that there was no impairment of Met-Ed's financial ability to continue service, that there was no undue discrimination caused by the contract and that there is no excessive burden upon other customers of Met-Ed. Further, the Judge found that other aspects of the public interest support maintenance of the agreement. He thus upheld the fixed-rate contract and did not reach the question of the rate to be imposed in lieu of the contract rate.

The Supreme Court in *Federal Power Commission* v. *Sierra Pacific Power Co.*,[1] clearly stated that a fixed-rate contract must be more than mildly unprofitable in order for the Commission to overturn it. The *Mobile-Sierra* test requires that the total impact of the contract be assessed from a public interest perspective, three elements of which are set out in the opinion. The key factor are whether

[1] 350 U.S. 348 (1955), See also, *United Gas Co.* v. *Mobile Gas Corp.* 350 U.S. 332 (1955).

the contract "might impair the financial ability of the public utility to *continue* its service, cast upon other customers an *excessive* burden, or be *unduly* discriminatory" (350 U.S. at 355; emphasis added).

According to the evidence in this proceeding, Met-Ed's total electric revenue for the 12 months ending July 31, 1973, was $172.5 million. Its net electric operating income was $36.6 million. Based on the rate Met-Ed would have the Commission adopt in their proceeding, Middletown's 1¢ rate produced a $500,000 shortfall for the last 11 months of 1974.

The *de minimis* nature of this deficit compared to Met-Ed's total electric revenues is the critical element in considering the effect on the public interest of the instant rate. While the utility argues that it has been forced to make substantial cuts in its *operations* budget, these cuts cannot be rationally associated with the Middletown contract. It is clear, certainly, that the $500,000.00 deficit incurred on the Middletown contract adversely affects the financial health of the company, but there is nothing in the record or the briefs to indicate that this deficit will, in any material way, impair the company's ability to continue service either to Middletown or to the remainder of Met-Ed's customers.

Met-Ed cites *Carolina Power & Light Co.*, Docket No. E-9991, Opinion No. 717, issued December 17, 1974, as grounds for finding financial impairment to the point of affecting its ability to continue service. In *Carolina* we indicated the criteria by which the impairment of financial abilities to continue service would be measured: "[O]ne is the amount by which the utility's revenues from the rate in question exceed its costs . . . and the other is the remaining effective period of the rate in question."[2] Met-

[2] *Carolina Power and Light Company*, Opinion No. 717, issued December 17, 1974, mimeo at 3. See also, Met-Ed's Brief on Exceptions at 10.

Ed's argument on this point, however, ignores *Appalachian Power Co.*, Docket No. E-7775, issued June 9, 1975. There we noted that a revenue deficiency (of $600,000.00 on six fixed-rate contracts) must be compared to the utility's total sales in order to ascertain its impact on the utility's continuation of service. There, as here, "it is clear that an inability to continue service could not possibly result from the continued operation of the contracts in question."[3] The Middletown contract does not adversely affect the public interest by impairing Met-Ed's ability to continue service and we will uphold the Presiding Law Judge's decision on this point.

Moving to the second element of the *Sierra* test, the question is whether Middletown's contract casts upon other consumers an excessive burden. The utility did not adduce substantial evidence indicating that the Middletown contract burdened Met-Ed's other customers excessively. In fact, Met-Ed's own witness, the Vice President of General Public Utilities Service Corporation (Met-Ed's parent) conceded that the revenue deficiency of Middletown was not passed on to the other customers of Met-Ed in any way.[4] Even if the deficiencies occasioned by the Middletown contract were borne by the other customers of Met-Ed, that fact standing alone would not be dispositive. The *Sierra* test requires an *excessive* burden on other customers. It is doubtful indeed that the revenue shortfall of the size involved here could ever cast such a burden upon the other customers of a utility the size of Met-Ed.[5] This is not to say, however, that at a future date the losses sustained as a result of Met-Ed's self-imposed, albeit improvident, bargain might not begin to cast some

[3] Appalachian Power Co., mimeo at 4-5.

[4] Tr. at 270-71.

[5] As noted *supra*, pp. 2-3, Met-Ed had revenues of $172 million and income of $36 million in fiscal year 1973.

burdens on other customers, conceivably even to the point of coming within the *Sierra* guidelines. That point, however, simply has not been reached at this juncture.

The only remaining question is whether the contract rate is unduly discriminatory. The Presiding Judge found in the negative. In addition, he found that the Borough of Middletown, if anyone, had been discriminated against by the rate for the last 65 years. Comparing Middletown to Kutztown (a similar community on Met-Ed's rate "RT") as Met-Ed and Staff desire, it is clear that the rate charged Middletown is and has been lower.[6] The larger question is whether this difference is "undue discrimination" in the language of *Sierra*.

A comparison of the Middletown rate with the average rate charged Hershey Electric Co. since 1969 reveals that the average rate to Hershey is .92¢. When compared to the average revenues from all resale customers over the same period, Middletown's rate is one half mill higher per Kwh. The issue thus framed is against what yardstick is discrimination to be measured? Even assuming *arguendo* that Kutztown is the appropriate measure, the problem to be resolved is whether discrimination is undue. Is there a factual basis by which the discrimination can be justified? There appears to be no difference between the two towns based upon cost of service, in fact, the only differences appear to be Middletown's 1906 contract and the consideration given by the community at that time.[7]

[6] The average rate charged Kutztown in selected years (1937, 1945, 1955, 1965, 1969, 1970, 1971, 1972, and 1973) has been 1.29¢, according to Met-Ed's FPC Form 1 (Tr. 443).

[7] The 1906 contract recites:

> "Inasmuch as the Borough is practically abandoning its present electric light plant at great loss to itself and has been induced by the company as a matter of economy and advantage to the Borough, it is agreed that this contract shall continue in full force indefinitely until terminated by the Borough. . . ."

Even finding discrimination, the question must be asked, "Who is damaged?" There is no contention that Kutztown's is not a just and reasonable rate; nor even that all other parties to rate RT are not paying just, reasonable and non-excessive rates.[8] Even if there is discrimination, there appears to be no damage to these third parties. They would receive no reductions were we to uphold Met-Ed's position here. Even were damages to be found, the fact that Middletown's customers would sustain a 50% rate increase raises substantial questions regarding whether the public interest would best be served by bailing Met-Ed out of its unwise bargain. The equities, once balanced, favor upholding the contract.

However distasteful the Middletown contract is to Met-Ed, this Commission cannot undo what the company has done unto itself. While we may sympathize with Met-Ed, we can do no more. The law is clear and we must affirm and adopt the Initial Decision herein.

The Commission finds:

Consistent with the discussion in this Opinion, the Initial Decision in this proceeding should be affirmed and adopted and the exceptions thereto denied.

The Commission orders:

Consistent with the discussion in this Opinion, the Initial Decision in this proceeding is affirmed and adopted and the exceptions thereto are denied.

By the Commission.
(SEAL)

KENNETH F. PLUMB
Secretary.

[8] Neither Kutztown, Hershey nor any other Met-Ed customer has complained of discrimination on account of the Met-Ed contract, nor have any customers intervened in this proceeding.

APPENDIX C

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

Metropolitan Edison Company

Docket No. E-8832

Order Denying Rehearing

(Issued July 30, 1976)

On March 6, 1974, Metropolitan Edison Company (Met-Ed) filed a petition requesting the Commission to investigate that company's wholesale rate to the Borough of Middletown, Pennsylvania. That rate was fixed by contract dated July 14, 1906 at 1¢ per kwh for as much power as Middletown required. The hearing on the petition was held December 11 and 12, 1974 before an Administrative Law Judge and an initial decision was issued September 2, 1975. Exceptions were filed and on June 1, 1976 we issued Opinion No. 764, Opinion and Order Affirming and Adopting Initial Decision. In that opinion we noted that the appropriate legal test had been set forth by the Supreme Court in *Federal Power Commission* v. *Sierra Pacific Power Company.*[1] In that case the Court stated that the Commission could only reform a fixed rate contract when to do so would be in the public interest. The Court also set out three elements of the public interest which we must consider. These factors are whether the contract, "might impair the financial ability of the public utility to continue its service, cast upon

[1] 350 U.S. 348 (1955).

other customers an excessive burden or be unduly discriminatory." In Opinion No. 764, we concluded that the Middletown contract with Metropolitan Edison could not be reformed by us on the basis of *Sierra Pacific Power Company*.

On July 1, 1976, Metropolitan Edison filed an application for rehearing of Opinion No. 764. The company contends that "the Commission reaches [its] conclusion only by a clear error of law: its theory that undue discrimination cannot exist if other wholesale customers receiving the same wholesale service as Middletown would receive no rate decrease if the Borough's rate is set aside."[2] The company argues, "the words 'undue discrimination' had a well established and clearly understood meaning at the time of the *Sierra* decision, namely, the difference of rates among customers of the same class which is not justified by differences in cost of service, operating conditions, or other considerations."[3]

We accepted the company's definition of undue discrimination in Opinion No. 764. At page 5 of that opinion we stated, "the problem to be resolved is whether discrimination is undue. Is there a factual basis by which the discrimination can be justified?" We concluded "there appears to be no difference between the two towns based upon cost of service, in fact, *the only differences appear to be Middletown's 1906 contract and the consideration given by the community at that time.*"

Kutztown (the customer most comparable with Middletown according to Met-Ed) does not have the benefit of a similar contract. Nor does it appear that any other customer of Met-Ed is so lucky. The fact of the contract cannot, however, be ignored. This contract, undesirable as it may be to Metropolitan Edison is certainly an

[2] Application at 2.

[3] Application at 6 (citations omitted).

operative "other consideration" as set forth in the company's own definition of undue discrimination.

That the 1906 contract is sufficient for us to make a finding of no illegal discrimination is implicit above. That finding is, however, made indefinitely easier where, as here, "there is no contention that Kutztown's is not a just and reasonable rate; nor even that all other parties to Rate RT are not paying just, reasonable and non-excessive rates . . . there appears to be no damage to these third parties."[4]

Met-Ed next contends that "because of the extremely favorable, less than cost-based rate available to Middletown in perpetuity, there is no way for Met-Ed, for Met-Ed's other customers and, indeed, for any supplier of electricity in the country to successfully [sic] compete with Middletown in terms of the power supply advantage it can offer to any industrial or other entity contemplating a move."[5] In support of this argument, Met-Ed cites *Federal Power Commission* v. *Conway Corp.*, 44 U.S.L.W. 4777 (June 8, 1976). They suggest that the situation here might be described as a reverse price squeeze which is just as inimical to the public interest.

This argument ignores the essential differences between a rate fixed by contract and a rate established by this Commission. In the former circumstance we are precluded by *Sierra Pacific* (*supra*) from imposing a rate other than that agreed to by the parties except in those situations set forth in *Sierra*. In the latter circumstance the Commission is charged with the act of rate making or at least with *de novo* review of the rate. This was the situation in which *Conway* arose.

The facts of this case simply do not allow a finding of a price squeeze. The 1906 contract established the

[4] Opinion No. 764 at 6.

[5] Application at 9.

relationship of the parties. That the price might ultimately become unfair to either party surely was considered by the drafters of the document. To the extent that Middletown might come to have a competitive advantage over Met-Ed, it is an advantage which could have been forseen and remedied by the York Haven Water and Power Company (Met-Ed's predecessor in interest) in 1906. To the extent that a price squeeze does exist, it is a self-imposed squeeze and one with which the parties must live. It is certainly distinguishable from the circumstances giving rise to *Conway*. Absent certain conditions as set forth above, this Commission is powerless to modify or extinguish the rights and duties the parties set for themselves in that contract. Metropolitan Edison has not set forth additional facts or theories of law which were not considered by us in reaching our determination that the Middletown contract, while discriminatory, is not unduly so.

In Opinion No. 764 we stated

> "Even were damages [occasioned by undue discrimination] to be found, the fact that Middletown's customers would sustain a 50% rate increase raises substantial questions regarding whether the public interest would be served by bailing Met-Ed out of its unwise bargain. The equities, once balanced, favor upholding the contract."[6]

Met-Ed argues that there is no evidence to support our conclusion that such a balancing does in fact favor upholding the contract. The company notes that over the years 1937 through 1975 Middletown has paid $2.5 million less than it would have, had it been charged the same rate as Kutztown, allegedly the appropriate measure of comparison. This fact represents one side of what can be termed the equitable equation. The other side of that

[6] Mimeo at 6.

equation, as we expressed in Opinion No. 764 is the fact that Middletown's customers would sustain a 50% rate increase were Middletown to be deprived of its contract right. The "balancing" in which we engaged in Opinion No. 764 involved an interpretation of these two facts. The unspoken question addressed by us was whether a $2.5 million shortfall over a period of some twenty-eight years by a company having a total electric revenue of $172.5 million for the year ending July, 1973 was more grievous than the potential 50% increase in rates to Middletown customers. The function of this Commission "is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and determine from [our] analysis of the *total situation* on which side of controversy the public interest lies."[7] Our analysis is certainly within our discretion and, as noted above, fully supported by the evidence.

Met-Ed next argues that our comparison of the revenue deficiency occasioned by the Middletown contract with the company's total electric revenue and total electric operating income was an erroneous application of the Supreme Court's *Sierra* test. That comparison is premised upon our reading of *Appalachian Power Company* Docket No. E-7775 issued June 9, 1975. There we stated, "It is clear that an inability to continue service could not possibly result from the continued operation of the [six fixed rate] contracts in question."[8] Here Met-Ed suggests that the Supreme Court merely required an impairment of financial condition as opposed to an inability to continue service. It ignores, however, the critical portion of the Supreme Court test. The significant language in the *Sierra* test is not whether or not the contract merely

[7] *United States* v. *Detroit and Cleveland Navigation Company*, 326 U.S. 236 quoted in *Federal Power Commission* v. *Transcontinental Gas Corporation*, 365 U.S. 1, 7 (1960) (emphasis added).

[8] Appalachian Power Company, mimeo at 4-5.

impairs the financial condition of the utility but rather whether it impairs the ability of the utility to *continue* service. When the continuation of service is seen to be the issue, the relevance of our comparison in *Appalachian Power Company* is apparent. The fact that service is unprofitable, or as here, producing a loss, is an inadequate basis for modifying the contract. The contract must be *so* unprofitable as to impact significantly upon the ability of the company to maintain and continue its operations. Here there is no allegation that absent our intercession the Middletown contract will bring to a halt Metropolitan Edison's operations.

We do not dispute that the company has and will probably continue to suffer negative effects from the Middletown contract. These effects, however, simply do not rise to the level contemplated by the Supreme Court in the *Sierra* test. Inasmuch as Met-Ed has not suggested any legal theory or new facts which we did not consider in our deliberations on Opinion No. 764, we are compelled to deny the company's application for rehearing on the question of the impairment of Met-Ed's ability to continue service.

The final argument advanced by Met-Ed is that the public interest is adversely affected in other ways not mentioned in the *Sierra* examples and not discussed by us in Opinion No. 764. This argument is merely a reiteration of its brief on exceptions. We considered the impact of this contract on Met-Ed's construction program and its work force. The company has shown no reason for us to reconsider those arguments at this point. Accordingly we will deny rehearing on the other public interest impact of the Middletown contract.

The Commission finds:

That no grounds exist for granting rehearing of our Opinion No. 764 Order Affirming and Adopting Initial Decision issued June 1, 1976.

The Commission orders:

Rehearing of our Opinion No. 764, Opinion and Order Affirming and Adopting Initial Decision, issued June 1, 1976 is hereby denied.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary